EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 8395

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the Application of

GAVIN W. CRAIG

For a Writ of Habeas Corpus.

GAVIN W. CRAIG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

RUSSELL GRAHAM, Esq.,

756 South Broadway,

Los Angeles, California.

JERRY GIESLER, Esq.,

215 West Fifth Street,

Los Angeles, California.

GAVIN W. CRAIG, Esq.,

In Propria Personum.

For Appellee:

PEIRSON M. HALL, Esq.,

United States Attorney,

HAL HUGHES, Esq.,

Assistant United States Attorney,

Federal Building,

Los Angeles, California.

United States of America, ss.

To United States of America Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 24 day of December, A. D. 1936, pursuant to an order allowing appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause entitled In The Matter of the Petition of Gavin W. Craig for a Writ of Habeas Corpus, No. 12964-H, wherein Gavin W. Craig is the appellant and you are appellee to show cause, if any there be, why the Order denying the petition for the Writ of Habeas Corpus in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable LEON R. YANKWICH United States District Judge for the Southern District of California, this 25 day of November, A. D. 1936, and of the Independence of the United States, the one hundred and sixty-first.

Leon R. Yankwich
U. S. District Judge for the Southern District of California.

[Endorsed]: Received copy of within citation this 25th day of November, 1936 Peirson M. Hall, attorney for appellee, By G. F. Filed Nov. 25, 1936 R. S. Zimmerman, Clerk By J. M. Horn, Deputy Clerk.

DISTRICT COURT OF THE UNITED STATES OF AMERICA SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF THE APPLICATION OF GAVIN W. CRAIG FOR A WRIT OF HABEAS CORPUS	Petition for a Writ of Habeas Corpus

Comes now your Petitioner, Gavin W. Craig, and presents his petition for a writ of Habeas Corpus and shows unto the Court the following:

I. That your petitioner is a citizen and resident of the City of Los Angeles, County of Los Angeles, State of California.

II. That your petitioner is now illegally imprisoned and restrained of his liberty and detained in the custody of the United States Marshall of the said Southern District of California and that said detention is within the jurisdiction of the United States District Court in and for the said district. That said detention by said United States Marshal is under color of authority of a certain warrant of commitment as will be more particularly set forth herein.

III. That the said Gavin W. Craig was made a defendant in a certain cause entitled "United States of America, Plaintiff, vs. Gavin W. Craig, Helen Werner, and Joseph Weinblatt, Defendants," and which cause was begun by indictment returned in the district court of the United States in and for the Southern District of California, Central Division, by the Grand Jury of the United States for the said division and district and which said indictment bears the number 12231-C, Criminal, a

copy of which said indictment is attached hereto marked Exhibit "A" and made a part hereof by reference.

IV. That said indictment consists of two counts, the first of which charges a conspiracy to commit an offense against the United States of America, to-wit: A conspiracy to obstruct the due administration of justice by unlawfully and corruptly bringing about the dismissal of a certain case then pending in the District Court of the United States in and for the Southern District of California, Central Division, entitled "United States of America versus Alfred C. Wilkes, et al" numbered 10679-M, Criminal.

V. That on the 25th day of February, 1935, a trial was begun on the said charge so contained in said indictment No. 12231-C, Criminal, which said trial continued to and including the 26th day of February, 1935, at which time the Court ordered the entry of a judgment in favor of the defendants on said first count of said indictment No. 12231-C, Criminal, which said judgment was then and there duly and regularly entered by the clerk of said Court, a copy of which said judgment is attached hereto marked Exhibit "B".

VI. That thereafter, the case was duly submitted to the jury on the second count of said indictment and that said jury disagreed and was duly and regularly dismissed by the Court.

VII. That upon the trial under said indictment No. 12231-C and also upon the trial under an indictment No. 12337-H (which said indictment No. 12337-H and the trial under it are more fully described hereinafter), evidence was submitted and testimony was given by witnesses called by the United States of America concerning and

in support of each essential ingredient of the respective offenses attempted to be charged in said respective indictments, as is shown and fully set forth in a statement of the testimony of each of said witnesses, attached hereto, marked Exhibit "C" and made a part hereof by reference.

VIII. That thereafter and on the 14th day of March, 1935, this petitioner, Gavin W. Craig, was made a defendant in a certain cause entitled, "United States of America vs. Gavin W. Craig, Helen Werner and Joseph Weinblatt," and which case was begun by an indictment by the Grand Jury of the United States in and for the Southern District of California, Central Division returned into the District Court for said District and Division bearing No. 12337-H, Criminal, a copy of which indictment is attached hereto marked Exhibit "D" and made a part hereof by reference.

IX. That said indictment numbered 12337-H, Criminal, consists of two counts, the first of which charges a conspiracy to obstruct and endeavor to obstruct the due administration of justice in a certain criminal proceeding then pending in the United States District Court for the Southern District of California, Central Division, entitled "United States of America Plaintiff, versus Alfred G. Wilkes, et al, Defendants," bearing No. 10679-M, Criminal, by unlawfully and corruptly bringing about the dismissal of the said last named cause.

X. That the first count of the said indictment No. 12337-H, Criminal, charged the same offense as did the

first count of the said indictment No. 12231-C, Criminal, and that the first count of the said indictment No. 12337-H, Criminal charged no other or different offense than that charged in the first count of the said indictment No. 12231-C, Criminal.

XI. That on the 30th day of April, 1935, a trial was begun on said charges so contained in count one of the said indictment No. 12337-H, Criminal, which said trial continued to and including the 7th day of May, 1935, upon which last named date the said cause was submitted to the jury which had theretofore been duly and regularly impaneled and sworn, and the said jury returned a verdict finding this petitioner guilty on the first count of the said indictment No. 12337-H, Criminal; that by reason of the acquittal of this petitioner on the first count of the said indictment numbered 12231-C, Criminal, your petitioner was, by virtue of the said trial on the first count of the said indictment numbered 12337-H, Criminal, twice placed in jeopardy for the same offense.

XII That at the time of the arraignment of this petitioner upon the said indictment, 12337-H, Criminal, this petitioner duly and regularly interposed a plea to the said indictment by which said plea it was shown that said petitoner had theretofore been acquitted of each and every offense charged in the first count of the said indictment in 12337-H, Criminal, a copy of which plea is attached hereto, marked Exhibit E, and made a part hereof by reference.

XIII. That thereafter and on the 10th day of May, 1935, the said Court pronounced judgment and sentence upon the said verdict of guilty on the first count of said indictment No. 12337-H, Criminal, by the terms of which the said petitioner, Gavin W. Craig was ordered to serve a term of imprisonment in a County jail for a period of one year and to pay a fine of One thousand ($1000.00) dollars, a copy of which said judgment and sentence is hereto attached, marked Exhibit "F", and made a part hereof by reference.

XIV. That thereafter and on the day of November, 1936, the said United States District Court for the Southern District of California, Central Division, issued a commitment in execution of the said judgment and sentence so pronounced on the first count of the said indictment 12337-H, Criminal, as aforesaid. That solely under color of authority of said commitment, the said United States Marshal for the said Southern District of California, took this petitioner into custody and is now illegally detaining this petitioner and depriving him of his liberty in the City of Los Angeles, County of Los Angeles, State of California, and within the Division and District aforesaid.

XV. That the said commitment and the said custody of this petitioner by the said United States Marshal are and each of them is illegal and void for the following reasons, to-wit:

1. The said United States District Court for the Southern District of California, Central Division, was

and is without power or jurisdiction to enter or impose a judgment or a sentence upon your petitioner on the first count of the said indictment No. 12337-H, Criminal, because:

(a) Your petitioner had been previously acquitted of the offense charged in the said first count of said indictment No. 12337-H, Criminal, as hereinbefore alleged.

(b) That the said first count of said indictment No. 12337-H, Criminal, did not state facts sufficient to constitute any offense against the United States or any of the laws thereof, for the following reasons:

1. That the said first count of the said indictment does not allege the persons whose decisions or actions your petitioner conspired corruptly to influence.

2. That the said first count of the said indictment does not allege what, if any, was the official function in which said persons were acting on behalf of the United States.

3. That the said first count of the said indictment does not allege that the persons whose decisions and actions it is alleged the petitioner conspired corruptly to influence were acting in any official function under or by authority of the laws of the United States.

4. That it is not alleged in the first count of the said indictment that the persons whose decisions and actions your petitioner is alleged to have conspired corruptly to influence were acting for or on behalf of the United

States in any official function under or by authority of any department or office of the government thereof.

5. It is not alleged in the first count of the said indictment that your petitioner conspired to promise, offer or give, or procure to be promised, offered or given, any money or anything of value, or to make or tender any contract, undertaking, obligation, gratuity or security for the payment of money or for the delivery or conveyance of anything of value to any officer of the United States or to any person acting for or on behalf of the United States in any official function under or by authority of any department or office of the Government thereof.

6. That the first count of the said indictment does not allege any facts which show that the persons, whose decisions and actions it is charged the petitioner conspired to influence, were officers of the United States or were persons acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, but said first count of the said indictment alleges conclusions only.

7. That it is not alleged in the first count of the said indictment that this petitioner conspired or agreed to influence corruptly or otherwise the decision or action of any person or persons whatsoever; it is merely alleged that this petitioner offered to influence the decision and actions of certain unnamed persons upon the happening of a future event and it is nowhere alleged in said first count that said event ever happened.

8. No facts are alleged in the first count of said indictment which show any of the essential elements of the offense attempted to be charged therein, but conclusions only are alleged.

XVI. For the reasons hereinbefore alleged, this petitioner is being deprived of his liberty without due process of law and in violation of his rights under the Fifth and Sixth amendments to the Constitution of the United States.

Wherefore, your petitioner prays that a writ of Habeas Corpus issue out of this Court, directed to the United States Marshal for the Southern District of California, to bring in and to have your petitioner before this Court, at a time to be by this Court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be made in the premises, and that this Court proceed in a summary way to determine the facts of this case in regard to the legality of the detention of your petitioner and to the deprivation of his liberty, and thereupon to dispose of your petitioner as law and justice may require, and your petitioner will ever pray.

Gavin W Craig

(Petitioner)

Russell Graham
Jerry Giesler
Gavin Morse Craig

(Attorneys for Petitioner)

EXHIBIT "A"

No. 12231-c Filed.....

Viol: Section 88 Title 18 United States Code.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

At a stated term of said court, begun and holden at the Coty of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California, on the second Monday of September in the year of our Lord one thousand nine Hundred thirty-four;

The Grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, and inquiring for the Southern District of California, upon their oath present*?*:

That ther*to*fore, to wit: on the 15th day *fo* December, 1931, there was pending and undetermined in the United States District Court, in the County of Los Angeles, within and for the Central Division of the Southern District of California, an indictment and criminal prosecution in which one JOHN McKEON, and divers other persons therein named, were charged with violation of Sections 37 and 215 of the Federal penal Code, to wit: a case entitled United *Sa*tes of America vs. Alfred *C*. Wilkes et al., No. 10-679-M Criminal in said above named Court;

That

GAV*E*N W. CRAIG
HELEN WERNER and
JOSEPH WEINBLATT;

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, with full knowledge and notice of said indictment and criminal prosecution was so pending and undetermined in said United States District Court in the County of Los Angeles, State, division and district aforesaid, did, on or about December 15, 1931, and at all times thereafter, up to and including the date of the finding and presentation of this indictment, in the County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other and with JOHN McKEON, who is not indicted herein, and whose name other than as herein stated, is to the grand jurors unknown, and with divers other persons whose names are to the grand jurors unknown, to promise, offer, give and cause to be promised, offered and given to each of certain persons, to wit: William B. Mitchell, then attorney general of the United States, Samuel W. McNabb, then United States Attorney for the said Southern District of California, and to divers other persons to said grand jurors unknown, each of whom was, and each of whom the defendants well knew was, throughout said period of time, then and there an officer of the United States and a person action for and on behalf of the United States in an official function, under and by authority of the Department of Justice of the United States and the laws of the United States, certain sums of money and other things of value the amount of money and the

things of value being to the grand jurors unknown, with intent then and there on the part of said conspirators fraudulently and corruptly to influence the decision and action of each of said persons in favor of JOHN McKEON and other persons whose names are to the grand jurors unknown, and against the interests of the United States, on said certain question, matter, cause and proceeding which was at that time pending before each of them, the said persons, in his official capacity, to wit: the proper conduct of said criminal prosecution in said case entitled United States of America vs Alfred C. Wilkes, et al., No. 10,679-M Criminal, then and there pending in said District Court of the United States, in the County of Los Angeles, within and for the Central Division of the Southern District of California, and with intent also on the part of said conspirators to influence said hereinbefore mentioned officers to do acts in violation of their lawful duty as such officers and persons, to wit: to bring about a dismissal of said prosecution without any other reason for so doing than the receipt of said sum of money and things of value by said hereinbefore mentioned officers.

OVERT ACTS.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That certain of said conspirators, at the several times and places in that behalf hereinafter mentioned, in connection with their names, did do, among others done by said conspirators, certain acts in furtherance of, in pursuance of and for the purpose of carrying out and to effect the object, design and purposes of said unlawful

conspiracy, combination and agreement aforesaid, that is to say:

1. That on or about the 1st day of February 1932 at Los Angeles, California, JOSEPH WEINBLATT accepted and received from JOHN McKEON a promissory note dated August 25, 1930 executed and signed by the Itale Petroleum Corporation of America and payable to R. S. McKeon in the principl sum of Twenty-five Thousand Dollars ($25000.00).

2. That on or about the 10th day of February, 1932, at Los Angeles, California, JOSEPH WEINBLATT offered to sell to ADOLPH RAMISH a promissory note in the amount of Twenty-five Thousand Dollars ($25000.00).

3. That on or about the 24th day of February, 1932, at Los Angeles, California, JOSEPH WEINBLATT collected and received one Hundred Dollars ($100.00) from JOHN McKEON.

4. That on or about the 1st day of March, 1932, at Los Angeles, California, JOSEPH WEINBLATT collected and received Eighty Dollars ($80.00) from JOHN McKEON.

5. That on or about the 9th day of March, 1932, at Los Angeles, California, Gavin W. Craig called John McKeon at his home on the telephone.

6. That on or about the 14th day of March, 1932, at Los Angeles, California, Helen Werner called Clay Carpenter on the telephone to make an appointment.

7. That on or about the 14th day of March, 1932, HELEN WERNER and GAVIN W. CRAIG made a trip to Long Beach, California, to see CLAY CARPENTER at his office.

8. That on or about the 14th day of March, 1932, GAVIN W. CRAIG and HELEN WERNER discussed with CLAY CARPENTER, at his office in Long Beach, California, the matter of payment of certain notes.

9. That on or about the 17th day of March, 1932, JOHN McKEON attended a meeting at the Stewart Hotel in San Francisco, California, for the purpose of discussing ways and means of raising money.

10. That on or about the 19th day of March, 1932, at Los Angeles, California, GAVIN W. CRAIG called JOHN McKEON on the telephone.

11. That on or about the 21st day of March, 1932, JOSEPH WEINBLATT went to the office of JOHN McKEON, at Los Angeles, California, and discussed the status of said unlawful and felonious conspiracy.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That heretofore, to-wit: on the 15th day of December, 1931, there was pending and undetermined in the United States District Court, in the County of Los Angeles, within and for the Central Division of the Southern District of California, an indictment and criminal prosecution in which one JOHN McKEON, and divers other persons therein named, were charged with violations of Section 37 and 215 of the Federal Penal Code, to-wit: a case entitled United States of America vs. Alfred G. Wilkens, et al., No. 10,697-M Criminal in said above named court:

GAVIN W. CRAIG
HELEN WERNER and
JOSEPH WEINBLATT

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, with full knowledge and notice that said indictment and criminal prosecution was so pending and undetermined in said United States District Court in the County of Los Angeles, state, division and district aforesaid, did, on or about December 15th, 1931, and at all times thereafter up to and including the date of the finding and presentation of this indictment, in the County of Los Angeles, state, division and district af*oe*said, and within the jurisdiction of the United States and of this Honorable Court, knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other and with JOHN McKEON, who is not indicted herein, and whose name, other than as herein stated, is to the grand jurors unknown, and with divers other persons whose names are to the grand jurors unknown, being the aforesaid unindicated conspirators, to corruptly endeavor to influence, obstruct, impede, h*u*nder, and to influence, obstruct, impede, hinder and embarrass the due administration of justice in said criminal proceeding pending in said Court and district aforesaid, that is to say:

That said defendants, GAVIN W. CRAIG, HELEN WERNER, and JOSEPH WEINBLATT, agreed to promise, offer, give and cause to be promised, offered and given to each of certain persons, to-wit: William D. Mitchell, then Att*o*ney General of the United States,

Samuel W. McNabb, then United States attorney for the said Southern District of California, and to divers other persons to said grand jurors unknown, each of whom was, and each of whom the defendants well knew was, throughout said period of time, then and there an officer of the United States and person acting for and on behalf of the United States in an official function, under and by authority of the Department of Justice of the United States and the laws of the United States, certain sums of money and other things of value, the amount of money and the things of value being to the grand jurors unknown, with intent then and there on the part of said conspirators fraudulently and corruptly to influence the decision and action of each of said persons in favor of JOHN McKEON and other persons whose names are to the grand jurors unknown, and against the interests of the United States, on said certain question, matter, cause and proceeding which was at that time pending before each of them, the said persons, in his official capacity, to-wit: the proper conduct of said criminal prosecution in said case entitled United States of America vs. Alfred *C* Wilkes, et al, No. 10-679-M Criminal, then and there pending in said District Court of the United States, in the County of Los Angeles, within and for the Central Division of the Southern District of California, and with intent also on the part of said conspirators to corruptly endeavor to influence, and to procure other persons, whose names are to the grand jurors unknown, to corruptly endeavor to influence said hereinbefore mentioned officers to do acts in violation of their lawful duty as such officers and persons, to-wit: to bring about a dismissal of said prosecution without any other reason for so doing than the receipt of said sums of money and things of value by said hereinbefore mentioned officers.

OVERT ACTS

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That certain of said conspirators, at the several times and places in that behalf hereinafter mentioned in connection with their names, did so, among others done by said conspirators, certain acts in furtherance of, in pursuance of and for the purpose of carrying out and to effect the object, design and purposes of said unlawful conspiracy, combination and agreement aforesaid, that is to say:

1. That on or about the 1st day of February, 1932, at Los Angeles, California, JOSEPH WEINBLATT accepted and received from JOHN McKEON a promissory note dated August 25, 1930, executed and signed by the Italo Petroleum Corporation of America and payable to R. S. McKeon in the principal sum of Twenty-five Thousand Dollars ($25,000.00).

2. That on or about the 10th day of February, 1932, at Los Angeles, California, JOSEPH WEINBLATT offered to sell to ADOLPH RAMISH a promissory note in the sum of Twenty-five Thousand Dollars ($25,000.00).

3. That on or about the 24th day of February, 1932, at Los Angeles, Califor*na*, JOSEPH WEINBLATT collected and received One Hundred Dollars ($100.00) from JOHN McKEON.

4. That on or about the 1st day of March, 1932, at Los Angeles, California, JOSEPH WEINBLATT collected and received Eighty Dollars ($80.00) from JOHN McKEON.

5. That on or about the 9th day of March, 1932, at Los Angeles, California, GAVIN W. CRAIG called JOHN McKEON at his home on the telephone.

6. That on or about the 14th day of March, 1932, at Los Angeles, California, HELEN WERNER called CLAY CARPENTER on the telephone to make an appointment.

7; That on or about the 14th day of March, 1932, HELEN WERNER AND GAVIN W. CRAIG made a trip to Long Beach, California, to see CLAY CARPENTER at his office.

8. That on or about the 14th day of March, 1932, GAVIN W. CRAIG and HELEN WERNER discussed with CLAY CARPENTER, at his office in Long Beach, California, the matter of payment of certain notes.

9. That on or about the 17th day of March, 1932, JOHN McKEON attended a meeting at the Stewart Hotel in San Francisco, California, for the purpose of discussing ways and means of raising money.

10. That on or about the 19th day of March, 1932, at Los Angeles, California, GAVIN W. CRAIG called JOHN McKEON on the telephone.

11. That on or about the 21st day of March, 1932, JOSEPH WEINBLATT went to the office of JOHN McKEON, at Los Angeles, California, and discussed the status of said unlawful and felonious conspiracy.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

PIERSON M. HALL
United States Attorney

Charles H. Carr
Assistant United States Attorney

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 12231-C Criminal
vs.	)	
GAVIN W. CRAIG, HELEN WERNER and JOSEPH WEINBLATT, Defendants	)	CLERK'S ENTRY OF JUDGMENT

2/28 Ord. defts have judgment on 1st ct.

EXHIBIT "D".

No. 12337-H Filed.....

Viol. Section 88 Title 18 United States Code.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California, on the first Monday of February in the year of our Lord one thousand nine hundred thirty-five.

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, and inquiring for the Southern District of California upon their oath present:

That heretofore, to-wit: on the 15th day of December, 1931, there was pending and undetermined in the United States District Court, in the County of Los Angeles, within and for the Central Division of the Southern District of California, an indictment and criminal prosecution in which one JOHN McKEON, and divers other persons therein named, were charged with violations of Sections 37 and 215 of the Federal Penal Code, to-wit: a case entitled United States of America vs. Alfred G. Wilkes, et al., No. 10,679-M Criminal in said above named court;

THat
GAVIN W. CRAIG,
HELEN WERNER and
JOSEPH WEINBLATT,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors *unknow,* each late of the Central Division of the Southern District of California, with full knowledge and notice that said indictment and criminal prosecution was so pending and undetermined in said United States District Court in the County of Los Angeles, state, division and district aforesaid, did, on or about December 15, 1931, and at all times thereafter up to and including the date of the finding and presentation of this indictment, in the County of Los Angeles, state, divi*s*on and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other, and with JOHN McKEON and FRED L. WILKE, said JOHN McKEON and FRED L. WILKE being not indicted herein, and whose names, other than as herein stated, are to the grand jurors unknown, and with divers other persons whose names are to the grand jurors unknown, to corruptly endeavor to influence, obstruct, impede, hinder, and to corruptly influence, obstruct, impede, hinder and embarrass the due administration of justice in said criminal proceeding pending in said Court and district aforesaid.

That said scheme and conspiracy was to be carried out in substantially the following manner, to-wit: That said defendants were to approach JOHN McKEON and represent and state to said JOHN McKEON that the

defendants could and would, for a large sum of money, corruptly bring about a dismissal of said indictment entitled United States of America vs. Alfred G. Wilkes, et al., No. 10679-M, then and there pending in said District Court of the United States within and for the Central Division of the Southern District of California; that said defendants would represent and state to said JOHN McKEON that said defendants could and would, by means of political influence, things of value, sums of money, or gratuitously, corruptly influence or cause other persons to corruptly influence the decision and action of the persons acting on behalf of the United States in an official function, under and by authority of the laws of the United States, and before whom, in their official capacity, said question, matter, cause and proceeding, to-wit: United States v. Alfred G. Wilkes, et al, No. 10679-M, was pending, in favor of JOHN McKEON and other persons whose names are to the grand jurors unknown and without regard to whether or not the said defendant, JOHN McKEON, and the other defendants in said criminal action, was or were guilty of the crime charged in said criminal action No. 10679-M, and against the interests of the United States; that said defendants would state and represent to JOHN McKEON that the defendants could and would corruptly bring about a dismissal of said indictment pending in said court, division and district aforesaid, by corruptly influencing and causing others to corruptly influence the decision and action of each of said persons acting for and on behalf of the United States in an official function, under and by authority of the laws of the United States, and before whom, in their official capacity, said criminal prosecution was pending, to do acts in violation of their lawful duty as

such officers and persons and prevent the conduct and presentation of said criminal prosecution, without regard to the merits thereof; that said defendants would represent and state to JOHN McKEON and other persons to the grand jury unknown that the defendants could and would, for a large sum of money, corruptly endeavor to, and corruptly influence Samuel M. Shortridge, then United States Senator to influence said hereinbefore mentioned officers to do acts in violation of their lawful duty as such officers and to bring about, or permit to be brought about, the dismissal of said prosecution, without regard to the merits of, and against the interests of the United States on, said matter, cause and proceeding which was at that time pending before each of said hereinbefore mentioned officers, in their official capacity; that the said defendants would corruptly procure and induce JOHN McKEON, and divers other persons whose names are to the grand jury unknown, to agree to pay large sums of money to said defendants, with the understanding and for the purpose that said defendants would corruptly endeavor to influence, or corruptly cause other persons to endeavor to influence, the decision and action of the persons acting for and on behalf of the United States in an official function, under and by authority of the laws of the United States and before whom, in their official capacity, said question, matter, cause or proceeding was pending, to do acts in violation of their lawful duty as such officers and bring about, or permit to be brought about, the dismissal of said indictment and prosecution, without regard to the merits of said criminal action and without regard to whether or not the said defendant, JOHN McKEON and the other defendants in said criminal action No. 10679-M, or any of the defendants in said criminal action, was or

were guilty of the crime charged in said indictment; that said JHON McKEON, and divers other persons to the grand jury unknown, would pay to said defendants the sum of Fifty Thousand Dollars ($50,000); that said GAVIN W. CRAIG, HELEN WERNER and JOSEPH WEINBLATT, defendants, and FRED L. WILKE, unindected co-conspirator, would corruptly bring about, or cause to be brought about, the dismissal of said criminal prosecution and indictment pending in said court, division and district aforesaid; that said GAVIN W. CRAIG, HELEN WERNER and JOSEPH WEINBLATT, defendants, and FREX L. WILKE, unindicted co-conspirator, and divers other persons to the grand jury unknown, would corruptly endeavor to influence, corruptly influence, corruptly cause other persons to endeavor to influence, and to corruptly influence by means of political influence, things of value, sums of money, or gratuitously, and gratuitously, the decision and action of the persons acting for and on behalf of the United States in an official function, under and by authority of the laws of the United States, and before whom, in their official capacity, said criminal prosecution was pending, in favor of said JOHN McKEON and divers other persons to the grand jury unknown, without regard to the merits of said criminal action and without regard to whether or not the said defendant, JOHN McKEON, and the other defendants in said criminal action, or any of the defendants in said criminal action, was or were guilty of the crime charged in said indictment, and against the interests of the United States, that is to say, to cause said hereinbefore mentioned officers to dismiss, or cause to be dismissed said indictment and to do other acts in violation of their lawful duty as such officers.

OVERT ACTS.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That certain of said conspirators, at the several times and places in that behalf hereinafter mentioned, in connection with their names, did do, among others done by said conspirators, certain acts in furtherance of, in pursuance of and for the purpose of carrying out and to effect the object, design and purposes of said unlawful conspiracy, combination and agreement aforesaid, that is to say:

1. That on or about the 1st day of February, 1932, at Los Angeles, California, JOSEPH WEINBLATT procured form JOHN McKEON a promissory note dated August 25, 1930, executed and signed by the Italo Petroleum Corporation of America and payable to R. S. McKEON in the principal sum of Twenty-five Thousand Dollars ($25,000.00)

2. That on or about the 10th day of February, 1932, at Los Angeles, California, JOSEPH WEINBLATT offered to sell to ADOLPH RAMISH a promissory note in the amount of Twenty-five Thousand Dollars ($25,000.00)

3. That on or about the 1st day of March, 1932, at Los Angeles Calif*ron*ia, JOSEPH WEINBLATT procured the said JOHN McKEON to pay to the said defendant JOSEPH WEINBLATT the sum of Eighty Dollars ($80.00)

4. That on or about the 9th day of March, 1932, at Los Angeles, California, GAVIN W. CRAIG called JOHN McKEON at his home on the telephone.

5. That on or about the 14th day of March, 1932, at Los Angeles Californai, HELEN WERNER called CLAY CARPENTER on the telephone to make an appointment.

6. That on or about the 14th day of March, 1932, HELEN WERNER and GAVIN W. CRAIG made a trip to Long Beach, California, to see CLAY CARPENTER at his office.

7. That on or about the 14th day of March, 1932, GAVIN W. CRAIG and HELEN WERNER discussed with CLAY CARPENTER, at his office in Long Beach, California, the matter of payment of certain notes.

8. That on or about the 17th day of March, 1932, JOHN McKEON attended a meeting at the Stewart Hotel in San Francisco, California, for the purpose of discussing ways and means of raising money.

9. That on or about the 19th day of March, 1932, at Los Angeles, California, GAVIN W. CRAIG called JOHN McKEON on the telephone.

10. That on or about the 21st day of March, 1932, JOSEPH WEINBLATT went to the office of JOHN McKEON, at Los Angeles, California, and discussed the status of said unlawful and felonious conspiracy.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

PIERSON M. HALL
United States Attorney,

CHARLES H. CARR
Assistant U. S. Attorney,

Exhibit "E".

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	NO. 12337-H
	)	
-vs-	)	PLEA IN BAR
	)	and
GAVIN W. CRAIG, et al.,	)	PLEA OF ONCE
	)	IN JEOPARDY
Defendants	)	

Comes now GAVIN W. CRAIG, one of the defendants in the above entitled cause, and presents this his Plea in Bar and his Plea of Once in Jeopardy, and respectfully represents:

1.

That heretofore, on the 19th day of December, 1934, a valid indictment was returned against this defendant and other defendants therein named, in cause No. 12231-C in the above entitled Court, wherein and whereby this defendant and said other named defendants were charged with a conspiracy, all as set forth in the copy of said indictment attached hereto, marked Exhibit "A" and made a part hereof the same as though set out at length herein.

11.

That thereafter, and on the 20th day of December, 1934, this defendant was arraigned on the charge contained in said indictment, and thereafter entered a plea of not guilty to the charges therein contained; that on the 25th day of February, 1935, said cause duly came on for

trial in the above entitled Court, which Court had jurisdiction of the cause; whereupon a jury was impaneled and sworn to try said cause and, evidence having been introduced on behalf of the plaintiff and this defendant, and both plaintiff and defendant having rested, the Court directed the entry of judgment in favor of all defendants on the first count of said indictment, and withdrew from the consideration of the jury the charge contained in the first count of said indictment, and said cause was then submitted to the jury on the second count of said indictment. The jury failed to agree on a verdict on said second count, and was discharged. All as fully appears by the record in said Court. This defendant did not consent to the discharge of said jury.

111.

Thereafter, and on the 14th day of March, 1935, an indictment was returned in the present cause against the same defendants named in the former indictment. The first count of which present indictment is attached hereto, marked Exhibit "B" and made a part hereof the same as thought set out at length herein.

*1*V.

Said defendants are now before the Court upon and in answer to said latter indictment.

V.

This defendant now pleads the action of the Court, as hereinbefore set forth, in bar of the first count of the present indictment, and also pleads that he has been placed once in jeopardy as to the first count of the present indictment, by reason, first, of the action of said Court in rendering and directing the entry of a judgment in his favor on count one of the former indictment; second,

because a jury was impaneled and sworn to try the case, and evidence was introduced on the first count of said former indictment; third, because a jury was impaneled and sworn to try the case, and evidence was introduced on the second count of said former indictment. This defendant did not consent to the discharge of said jury.

VI.

In support of such pleas this defendant avers:

1st: That he is the same Gavin W. Craig named and charged in said former indictment;

2nd: That all of the above proceedings have been had in the above entitled court;

3rd: That the offense charged in the first count of said former indictment and the offense charged in the first count of the present indictment are the same in law;

4th: That the offense charged in the second count of said former indictment and the offense charged in the first count of the present indictment are the same in law;

5th: That the offense charged in the first count of said former indictment and the offense charged in the first count of the present indictment are the same in fact;

6th: That the offense charged in the second count of said former indictment and the offense charged in the first count of the present indictment are the same in fact;

7th: That the evidence necessary to convict under the first count of the former indictment is the same evidence necessary to convict under the first count of the present indictment;

8th: That the evidence necessary to convict under the second count of said former indictment is the same as the evidence required to convict under the first count of the present indictment;

9th: That the acts charged as against this defendant under the first count of said former indictment are the same acts charged under the first count of the present indictment;

10th: That the acts charged as against this defendant under the second count of said former indictment are the same acts charged under the first count of the present indictment.

V*11*.

This defendant further avers that if the acts alleged to have been committed and the facts pleaded in the present indictment had been proven to the satisfaction of the jury in the former case, and had been believed by the jury, they would have been sufficient to support a verdict of guilty in said first trial under each count of said former indictment.

V*111*.

This defendant hereby offers to prove that the offenses charged under both the first count and the second count of said former indictment and the offense charged under the first count of the present indictment are the same in law and in fact, both by the record in said former case and by extrinsic evidence.

*1*X.

This defendant avers that upon the trial of said cause the Government introduced evidence, and the Court and jury had before them evidence, to the effect that the defendants conspired to bring about the corrupt dismissal of that certain indictment entitled United States of America vs. Alfred G. Wilkes, et al., No. 10679-M, then and there pending in the above entitled Court, not only by

means of offering to the officers of the United States mentioned in said indictment, sums of money and other things of value, but also by means of political influence and gratuitously, and by means of seeking to cause other persons, and particularly United States Senator Samuel M. Shortridge, to cause the officers and persons officially in charge of, and before whom said proceedings on said Italo indictment was pending, to do acts in violation of their lawful duty and bring about, or permit to be brought about, the dismissal of said proceeding without regard to the merits and without regard to whether the defendants therein were guilty or innocent of the charges therein.

X.

By reason of the premises aforesaid this defendant has been placed in jeopardy upon the charge contained in the first count of this indictment, and by reason of such jeopardy having attached has been acquitted of the charge contained in the first count of this indictment. Notwithstanding said fact the plaintiff is endeavoring to proceed to again place this defendant on trial upon the charges contained in the first count of this indictment and also contained in the first count and in the second count of said former indictment. All of which is in violation of this defendant's rights under the constitution and the laws of the United States.

That in support of, and in defense to the charge contained in the first count of the former indictment, and in support of, and in defense to the charge contained in the second count thereof, the parties thereto introduced evidence, as more fully appears from the transcript of testimony taken at said trial, a copy of which is attached hereto and made a part hereof, and marked Exhibit "C".

WHEREFORE, this defendant prays judgment dismissing as against this defendant the charges contained in the first count of the indictment herein, and holding that the judgment directed by the trial court on the first count of the former indictment is a bar to any further proceedings against this defendant under, either the first count of the present indictment or the second count of the former indictment.

GAVIN W. CRAIG
Defendant

MARK L. HERRON
A. I. McCORMICK
AMES PETERSON
VINCENT MORGAN
Attorneys for said Defendant

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES)

GAVIN W. CRAIG, being by me first duly sworn, deposes and says: That he is one of the defendants in the within entitled action; that he has read the foregoing Plea and knows the contests thereof and that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and that as to those matters that he believes it to be true.

GAVIN W. CRAIG

Subscribed and Sworn to before me this 6th day of April, 1935.

RAYMOND HOIGHT
Notary Public in and for the County of Los Angeles, State of California

Exhibit "F".

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 12337-H
vs.	)	Criminal
	)	
GAVIN W. CRAIG,	)	CLERK'S
HELEN WERNER and	)	ENTRY OF
JOSEPH WEINBLATT,	)	JUDGMENT
	)	
Defendants.	)	

It is the judgment of the Court that defendants Gavin W. Craig and Joseph Weinblatt be, and each hereby is assessed a fine of one thousand ($1000.00) dollars, and they are committed to the custody of the Attorney General of the United States for confinement in a jail for a period of one (1) year.

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

Gavin W. Craig, being by me first duly sworn, deposes and says that he is The petitioner in the above entitled matter, that he has read the foregoing Application and Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

Gavin W. Craig

Subscribed and sworn to before me this 14th day of November 1936.

[Seal] Grant M. Raymond
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 16, 1936 R. S. Zimmerman, Clerk By J. M. Horn, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 16th day of November in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable LEON R. YANKWICH, District Judge.

In the matter of the Application of GAVIN W. CRAIG, for a Writ of Habeas Corpus.	No. 12964-H Crim.

This matter coming on for hearing on petition for a Writ of Habeas Corpus; Jerry Giesler, Gavin M. Craig and Russell Graham, Esqs., appearing for the petitioner and Gavin W. Craig being present in propria persona; Hal Hughes and Howell Purdue, Assistant U. S. Attorneys, appearing for the Government;

Russell Graham, Esq., argues in support of petition;

Gavin W. Craig, petitioner, argues in support of petition;

Howell Purdue, Esq., makes a statement; whereupon

The Court orders that Writ be denied. Exception noted.

[Title of Court and Cause.]

PETITION FOR APPEAL

GAVIN W. CRAIG, Petitioner above named, deeming himself aggrieved by the order and judgment entered herein on November 16, 1936, denying his petition for a Writ of Habeas Corpus, does hereby appeal from the said order and judgment to the United States Circuit Court of *Appeal* for the Ninth Circuit and prays that a transcript and record of proceedings and papers on which said order and judgment was made duly authenticated may be sent to the United States Circuit Court of *Appeal* for the Ninth Circuit.

Dated this 17th day of November, 1936.

Jerry Giesler
Gavin W. Craig
Russell Graham
Attorneys for Petitioner

The appeal is allowed this 17th day of November, 1936.

Leon R. Yankwich
District Judge

[Endorsed]: Received copy of the within this 18th day of Nov. 1936. Pierson M. Hall by Hal Hughes attorney for U. S. Filed Nov. 18, 1936 R. S. Zimmerman, Clerk By J. M. Horn, Deputy Clerk.

DISTRICT COURT OF THE UNITED STATES OF AMERICA SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF THE APPLICATION OF GAVIN W. CRAIG FOR A WRIT OF HABEAS CORPUS	))))	No. 12964-H ASSIGNMENT OF ERRORS

Comes now Gavin W. Craig, by his attorneys, Jerry Giesler, Gavin M. Craig, and Russell Graham, in connection with his petition for an appeal herein assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled cause and upon which he will rely upon appeal to the Circuit Court of *Appeal* for the Ninth Circuit, to wit:

1. That the Court erred in denying the petition for a Writ of Habeas Corpus herein.

2. That the Court erred in holding that it had no jurisdiction to issue a Writ of Habeas Corpus as prayed for in the petition herein.

3. That the Court erred in not holding that the allegations contained in the petition herein for a Writ of Habeas Corpus were sufficient in law to justify the granting and issuing of a Writ of Habeas Corpus as prayed for in said petition.

WHEREFORE, the appellant prays that the judgment and order of the United States District Court in and for the Southern District of California, Central Division,

made and entered herein in the office of the Clerk of the said Court on the 16th day of November, 1936, denying and dismissing the petition for a Writ of Habeas Corpus be reversed, and that this cause be remanded to the said lower court with instructions to issue a Writ of Habeas Corpus as prayed for in said petition.

Dated: November 17, 1936.

Jerry Giesler
Gavin M. Craig
Russell Graham
Attorneys for Appellant

[Endorsed]: Received copy of the within this 18th day of Nov, 1936 Pierson M. Hall by Hal Hughes, attorney for U. S. Filed Nov. 18, 1936 R. S. Zimmerman Clerk By J. M. Horn, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, GAVIN W. CRAIG, as principal, and Florida Brownsberger and ADELAIDE L. DEAN as sureties, are jointly and severally held and firmly bound unto the United States of America in the penal sum of Two Hundred and Fifty Dollars ($250.00) to be paid to said United States of America; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 15th day of December, 1936.

WHEREAS, the above named GAVIN W. CRAIG has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree made, rendered and entered on the 16th day of November, 1936, in the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause;

AND WHEREAS, said District Court of the United States for the Southern District of California, has fixed

the amount of Petitioner's bond on said appeal in the sum of Two Hundred and Fifty ($250.00) Dollars;

NOW THEREFORE, the condition of this obligation is such that if the above-named GAVIN W. CRAIG shall prosecute his said appeal, and any appeal allowed to be taken to the Supreme Court of the United States to effect, and answer all costs which may be adjudged against him, if he fails to make good said appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Gavin W. Craig
Principal

Adelaide Lee Dean
Florida Brownsberger
Sureties

STATE OF CALIFORNIA)
(ss:
COUNTY OF LOS ANGELES)

On this 16th day of December, 1936, before me personally appeared Florida Brownsberger and on Dec. 15, 1936, ADELAIDE L. DEAN known to me to be the persons described in and who duly executed the foregoing instrument, and acknowledged that they executed the same.

And the said Florida Brownsberger and ADELAIDE L. DEAN, each being by me duly sworn, for herself says that she is a resident and householder of the said county of Los Angeles and that she is worth the sum of $1000 over and above her just debts and legal liabilities and property exempt from execution.

Adelaide Lee Dean
Florida Brownsberger

Subscribed and sworn to before me this 15th and 16th days of December, 1936.

[Seal] R. S. ZIMMERMAN
Clerk, U. S. Dist. Court.

Examined and recommended for approval, as provided in Rule 28.

G. M. Craig
Attorney for Petitioner.

I hereby approve the foregoing bond this 15th day of December, 1936.

Leon R. Yankwich
United States District Judge.

[Endorsed]: Filed Dec 16 1936 R. S. Zimmerman, Clerk, By J. M. Horn, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that, in preparing the Transcript on Appeal, herein, Exhibit "C" attached to the petition for a writ of habeas corpus, may be omitted from said transcript.

The said Exhibit "C" consists of that portion of the Transcript on Appeal in Case No. 7862, in the United States Circuit Court of Appeals for the Ninth Circuit, entitled Gavin W. Craig, Appellant, vs. United States of America, containing a statement of the evidence.

IT IS FURTHER STIPULATED that the statement of the evidence contained in the transcript in the said case no. 7862 may be referred to at the hearing on this appeal.

PEIRSON M. HALL
United States Attorney

By Hal Hughes
Assistant United States Attorney

Russell Graham
Attorney for Appellant

[Endorsed]: Filed Dec. 18, 1936 R. S. Zimmerman Clerk By J. M. Horn Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please issue Transcript of Record, including:

1. The Petition for a Writ of Habeas Corpus; minus: Exhibit "C" attached thereto, Points and Authorities attached thereto.

2. The Order denying the Petition;

3. The Petition for Appeal and the Order allowing the same;

4. The Assignment of Errors;

5. The Citation;

6. This Praecipe.

7. Stipulation re transcript

8. Bond on Appeal

Pierson M Hall
U. S. Atty by
Hal Hughes
Asst.
Russell Graham
Atty for App.

[Endorsed]: Filed Dec. 18, 1936 R. S. Zimmerman Clerk By J. M. Horn Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 44 pages, numbered from 1 to 44 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; petition for writ of habeas corpus; order denying writ of habeas corpus; petition for appeal and order allowing appeal; assignment of errors; stipulation re printing of transcript; bond on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 23rd day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixty-first.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8395

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the Application of
GAVIN W. CRAIG
For a Writ of Habeas Corpus.

Gavin W. Craig,
Appellant.

vs.

United States of America,
Appellee.

OPENING BRIEF OF APPELLANT.

JOHN P. BEALE,
E. T. McGANN,
GAVIN MORSE CRAIG,
904 Broadway Arcade Bldg., Los Angeles,
Attorneys for Appellant.

GAVIN W. CRAIG,
In Propria Personam.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Application of
GAVIN W. CRAIG
For a Writ of Habeas Corpus.

Gavin W. Craig,
Appellant.

vs.

United States of America,
Appellee.

OPENING BRIEF OF APPELLANT.

Statement of Facts and Pleadings Which Form Basis of Jurisdiction.

Appellant was tried and convicted in the United States District Court for the Southern District of California, Central Division, upon an indictment in said court charging a violation of Title 18, U. S. C. A., section 88, being Indictment No. 12237-H. [Tr. p. 21.]

Judgment was pronounced by the court by which appellant was sentenced to serve one year in a county jail.

Commitment was issued thereon and appellant was taken into custody.

While in custody under said commitment, appellant petitioned said District Court for a writ of *habeas corpus* [Tr. p. 3] which was denied. [Tr. p. 36.] Said District Court's jurisdiction to entertain said petition and issue a writ of *habeas corpus* is found in 28 U. S. C. A., Sec. 451.

Appellant duly and regularly filed with said District Court his petition for appeal [Tr. p. 37] which was allowed by said court. Said petition was accompanied by an assignment of errors [Tr. p. 38] which was duly filed.

This court has jurisdiction upon appeal to review the order of the District Court denying said petition. (28 U. S. C. A. 463.)

Statement of the Case.

This appeal is from an order of the above named United States District Court refusing to issue a writ of habeas corpus. It appears from the petition and the exhibits attached thereto that an indictment, No. 12231-C in said court, and which will be referred to as the "former indictment", was duly returned therein; that this indictment named petitioner and others and charged them with conspiracy to obstruct the due administration of justice; that it consisted of two counts, each charging said offense. Trial under said indictment was had, beginning February 25th, 1935, and after both sides had rested the court rendered judgment as follows: "Or rather, instead of dismissing, judgment for the defendants on count one." As to the other count, the jury disagreed.

Thereafter another indictment, referred to herein as the "last indictment," was returned in said court, being No.

12237-H therein; that the first count thereof attempted to charge the same persons accused in the former indictment with the same offense as had been charged in count one of said former indictment and with conspiracy to endeavor to obstruct the due administration of justice; and that said last named count one charges the same and no other offense as did count one of the former indictment; that before trial under the last indictment petitioner duly interposed a plea in bar averring that by reason of the aforesaid judgment he had been acquitted of each offense attempted to be set forth in said count one of said last indictment. This plea was ordered stricken.

Thereafter a trial was had and the jury returned a verdict of guilty against petitioner; judgment was pronounced by the court by which petitioner was sentenced to serve one year in a county jail; commitment was issued thereon and petitioner was taken into custody and was in custody under said commitment when application was made for said writ of habeas corpus.

The last indictment is attached to the petition as Exhibit D. It attempts to allege the substantive offense which the defendants conspired to commit to be, corruptly influencing "the persons acting for and on behalf of the United States in an official function, under and by authority of the laws of the United States and before whom, in their official capacity, said question, matter, cause and proceeding was pending." The matter pending is named as a case referred to herein as "the Italo Case," which it is averred was pending in the said United States District Court.

The former indictment contained similar language except that it named "the persons" as Samuel McNabb and William B. Mitchell, and averred that these persons were United States District Attorney for said district and Attorney General of the United States, respectively. The former indictment is attached to the petition as Exhibit A.

Also there is attached to the petition a copy of all of the testimony introduced by the Government upon both trials (Ex. C) and a copy of the judgment rendered by the court in the former trial. (Ex. F.)

Attention is called to a stipulation entered into by the United States attorney and petitioner [Tr. p. 43] whereby it is stipulated that Exhibit C may be omitted from the transcript on appeal and that the statement of evidence contained in the transcript in case No. 7862 in this court, entitled Gavin W. Craig v. U. S. may be referred to at the hearing on this appeal.

Questions Presented on Appeal.

From the record, the following questions are presented:

1. Did the petitioner have a right to the issuance of the writ as prayed.

2. Is petitioner being illegally restrained of his liberty under said judgment of conviction based on the last indictment.

3. Is said judgment of conviction void because the last indictment:

(a) Charges no offense against the United States.

(b) Violates petitioner's rights guaranteed by the fifth amendment to the Constitution, in that it does not protect him from being placed twice in jeopardy for the same offense, and that it does not provide due process; and that it also violates petitioner's right, guaranteed by the sixth amendment to the Constitution in that it does not inform the defendants of the nature of the charge against them.

4. Did the judgment rendered in the former trial acquit the defendants then on trial under the former indictment.

5. Does the last indictment attempt to charge the same and no other offense than that named in the former indictment.

6. Did the former indictment charge an offense against the United States.

7. Is said judgment of conviction void because the last indictment:

(a) Charges no offense against the United States in that said last indictment alleges no facts which show that the accused entered into a complete and unconditional agreement to commit the substantive offense therein attempted to be charged.

(b) Said last named indictment nowhere avers that the accused agreed to promise, offer to give, or to procure to be offered, promised or given anything to anyone, or to do or promise to do, anything for anyone to secure the dismissal of the Italo case.

Specification of Errors Relied Upon

Petitioner relies upon each of the following assignments of error [Tr. p. 38]:

1. That the court erred in denying the petition for a writ of *habeas corpus*.

2. That the court erred in holding that it had no jurisdiction to issue a writ of *habeas corpus* as prayed for in the petition.

3. That the court erred in not holding that the allegations contained in the petition for a writ of *habeas corpus* were sufficient in law to justify the granting and issuing of a writ of *habeas corpus* as prayed for in the petition.

Preliminary Questions.

Ordinarily we do not anticipate objections which may or may not be raised by opposing counsel, and we will not do so in *extenso* here. However it appears appropriate to remove any question that might arise as to the right of petitioner to be heard on this appeal upon the grounds upon which we rely and which we shall urge for reversal of the judgment refusing to issue the writ of habeas corpus.

This proceeding constitutes a collateral attack upon the judgment of conviction. The preliminary questions which might arise are: 1. May the judgment of conviction be attacked collaterally; and 2. Is the judgment of conviction or the judgment of this court affirming the judgment of conviction *res adjudicata* of the issues presented in the

instant petition? The answer to these questions is found in the following principles:

(1) It is settled law that a judgment of conviction may be collaterally attacked upon the ground that it is void; we believe it to be equally well settled that this may be done in any case where such judgment is relied upon either by way of estoppel or as *res adjudicata;* and especially may such judgment be attacked collaterally through a petition for a writ of habeas corpus.

(2) When a judgment is subject to collateral attack its force is so far destroyed that a question which the court considered in reaching its conclusion can no longer be deemed *res adjudicata.*

(3) The judgment of an appellate court affirming a void judgment is itself void.

(4) Upon collateral attack where it is asserted that the judgment is void, inquiry is made *de novo* concerning all issues and facts upon which its validity rests.

Therefore, in this habeas corpus proceeding the judgment of conviction being attacked as void for want of jurisdiction of the court to render it, the inquiry must include all grounds which we shall argue which may be decisive of that issue, whether presented to this court on the former appeal from the judgment or not so presented.

However, it is certain that the two grounds upon which we principally rely herein were not presented or considered by the court or determined by the judgment affirming the judgment of conviction. Hence, for this further reason, the rule of *res adjudicata* cannot apply to them or bar their consideration.

Two Principal Grounds New.

The first of these two grounds, briefly stated, is that the indictment fails to set forth any facts to identify or particularize either the official functions or the official capacities or the persons whom it is attempted to be charged that the accused conspired to corruptly influence to bring about the dismissal of the Italo case; that such facts constitute an essential ingredient of the offense attempted to be charged. Hence, that the indictment charges no offense against the United States and is wholly insufficient for any purpose.

Upon the former appeal from the judgment of conviction this defect was not presented to this court. The opinion of this court does not mention it. Neither the specification of error in the bill of exceptions, nor the assignments of error in appellant's brief mention it. Such specifications and assignments and the opinion all deal with two other grounds upon which the sufficiency of the indictment was questioned. The first of these was the insufficiency of the charge of one of the elements of the offense attempted to be set forth in the indictment, namely, that of the conspiring of the accused. It was contended that although facts constituting this element were set forth, they were pleaded by inference only, and that this form of pleading was insufficient. This court held that the indictment was good as against this criticism.

By appropriate assignments of error (Ex. C p. 732) it was also urged that the indictment did not charge an unconditional and complete conspiracy, but only an incoate and conditional agreement between the alleged conspirators. This court held that the indictment was also good as against this attack.

The second ground upon which petitioner asks to be discharged in this proceeding and which was not presented or decided in the appeal from the judgment of conviction, is that this petitioner was acquitted of the offense charged in the indictment appealed from and for which he is now restrained of his liberty, by a judgment in a former trial of petitioner for the same offense.

Neither by the assignment nor by the specifications of error on the appeal from the judgment of conviction was this issue presented, nor is it mentioned in the opinion of this court affirming said judgment. The issue was presented to this court at that time that the action of the Government's attorney in attempting to dismiss count one of the former indictment constituted an acquittal. This court held that such action was a *nolle prosequi,* and as such did not bar a further prosecution of the same offense.

In this collateral attack upon the judgment of conviction petitioner has argued and will insist here that the court during the former trial rendered judgment for this petitioner and acquitted him of the same offense as that of which he was convicted, and that therefore the judgment of conviction is void.

Res Adjudicata Inapplicable.

We believe it to be settled law and incontrovertible that, as stated in 15 R. C. L. 840, "When a judgment can be collaterally attacked its force is so far destroyed that a question which the Court considered in reaching its conclusion can no longer be deemed *res adjudicata.*" Again we quote from 15 R. C. L. 895, where it is said: "Yet it is equally well settled that such judgments (those of courts of general jurisdiction) may be collaterally attacked when a want of jurisdiction affirmatively appears from an inspection of the *record.*" (Citing many cases.) The lack of jurisdiction is apparent from the record in the instant case.

In 15 R. C. L. 896 it is emphasized that if want of jurisdiction affirmatively appears from the *record* the estoppel of *res adjudicata* does not exist, and cases are cited.

In *Freeman on Judgments,* 5th Edition, page 643, it is said: "A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, it neither binds nor bars anyone." Citing authority. And on page 3172 similar statements are made.

It follows that since the lack of jurisdiction appears on the face of the instant indictment and of the judgment of acquittal, and of the indictment upon which it was rendered this judgment of conviction is not *res adjudicata* in this proceeding. And this coincides with the rule that where a judgment is void it can be attacked collaterally, and where it can be attacked collaterally a judgment is not an estoppel as *res adjudicata.*

At this point, and to clear away any possible objection to a consideration of the merits of this appeal on the theory that the judgment of conviction can be regarded as *res adjudicata* as to any issues to be presented, only a few cases will be cited which hold that the petitioner must be discharged through *habeas corpus* where it appears that he is restrained of his liberty after conviction under an indictment which is void for failure to state an offense against the United States.

First to be mentioned is one of this Circuit, *Mackay v. Miller,* 126 Fed. 161. The statute under which the defendant was prosecuted was one "to prevent smuggling." It inhibits resisting "any officer of the customs or his deputies." The indictment charged the accused with resisting an Indian agent who was making a search on the reservation for spirituous liquors. It was held that the indictment charged no offense. After final conviction, sentence, and imprisonment the accused was released on *habeas corpus.* As to the right to *habeas corpus,* the court said:

> "But the doctrine is well established that upon a writ of *habeas corpus,* if it appears that the court which rendered the judgment had not jurisdiction to render it, either because the proceedings under which they were taken are unconstitutional, or for any other reason the judgment is void, and may be questioned collaterally, and the person who is imprisoned thereunder may be discharged from custody on *habeas corpus.*"

This case has never been overruled, either in this Circuit or by the United States Supreme Court. It cites among other cases *In re Siebold,* 100 U. S. 371, and *Nielson v. U. S.,* 131 U. S. 176.

See, also:

In re Greene, 52 Fed. 104, and
Kansas etc. v. Morgan, 76 Fed. 429.

In *Aderhold v. Schiltz,* 73 Fed. (2d) 381, the indictment charged "attempt to rob" a postal clerk. The statute made it an offense to "assault with intent to rob" any person having the custody of any mail matter. After judgment of conviction it was held that the indictment did not charge an offense against the United States, and hence, that the petitioner was entitled to release on *habeas corpus.*

Indeed, in each of the proceedings which will be cited and many of them quoted from, later in this brief, in which petitioners have been discharged on *habeas corpus,* a final judgment of some court was collaterally attacked. In nearly all of them the judgment was attacked for lack of jurisdiction because the indictment did not state some essential ingredient of the offense attempted to be charged, although in many instances it did allege such ingredient in generic language. In practically all of these proceedings the final judgment was rendered by a court of general jurisdiction, federal or state; in some it had been affirmed by a federal appellate court and in others by a state appellate court. In connection with cases of the last mentioned class, it is a basic principle of the doctrine of *res adjudicata* that it is applicable equally to judgments of all courts, regardless of degree or jurisdiction, including those rendered by a justice of the peace. (15 *Cal. Jur.* 107.)

Also contained in this record is the judgment of acquittal to which we have referred. This judgment was ren-

dered by Hon. Jeremiah Neterer during the former trial of petitioner for identically the same offense of which he was convicted and for which he is now imprisoned. [Tr. p. 34.] In so far as the possible preliminary objections which are being discussed at this point in our brief are concerned, all that has been said as to our right to attack the judgment of conviction collaterally on the ground that the indictment is void and that the court has no jurisdiction is equally applicable here; this is true as well as to the other grounds relied upon and issues raised by the instant petition, for each ground set forth questions the jurisdiction of the court to render the judgment.

Appellate Court Judgment Void Which Affirms Void Judgment.

Finally, before entering upon the argument of the grounds upon which this appeal is taken, attention is called to the law which is settled to the effect that a judgment of an appellate court which affirms a void judgment is itself void. This proposition may be so obvious as not to require the citation of authority. However, among those which may be cited is *Ball v. Tolman,* 135 Cal. 375. In the original case in which judgment had become final, judgment for the plaintiff was entered January 9, 1897, and an appeal was taken. In the meantime the penal clause in the statute on which the judgment was grounded was repealed. However, on appeal the judgment was affirmed. Thereafter, defendant's attorneys made a motion for stay of execution. This was denied. Execution was levied and the lands sold. A motion was made to vacate and set aside the sheriff's sale and for an order staying all proceedings on said judgment. This was denied, and another appeal taken.

It was contended that the judgment of the Supreme Court affirming the lower court's judgment was with jurisdiction and that the former judgment was *res adjudicata* and ended the matter. The Supreme Court, however, held that it had no jurisdiction to affirm the void judgment of the Superior Court. It quotes from *Freeman on Void Judicial Sales,* Sec. 2, and from *Freeman on Executions,* Sec. 16, Note 2. Also from *Pioneer etc. Co. v. Maddux,* 109 Cal. 633, which held that the affirmance of a void judgment is itself void, saying that while the facts in the last named case were different the principle decided was that where the trial court lacks jurisdiction to render a judgment, its affirmance by an appellate court cannot impart validity to it. Also in *Freeman's Work on Judgments,* last edition, page 643, it is said, "the fact that a void judgment has been affirmed on review in an appellate court * * * adds nothing to its validity."

Indictment Failing to Identify and Describe Substantive Offense Is Void.

As briefly as may be we will now present the merits of this petition for the discharge of the petitioner herein on *habeas corpus* and the grounds for reversal of the judgment of the trial court refusing to issue the writ.

The petition specifically sets forth four grounds. It asserts [Tr. p. 8] that the judgment of conviction of petitioner under the commitment by which he is now imprisoned is void for want of jurisdiction of the court to render it; that such judgment is void because the indictment from which it must derive its life, if life it has, is void,—it is dead, it is wholly insufficient for any pur-

pose. This is so because it sets forth no facts sufficient to constitute any offense against the United States. This failure to charge an offense results from the fact that it contains no averment of any fact concerning an essential ingredient of the offense attempted to be stated, to-wit, the identification and particularization of the official funtion, the official capacity and the person of any of the "persons" whom the indictment charges the petitioner conspired with others to corruptly influence to bring about the dismissal of a case known as the "Italo case." It does not *at all* identify the substantive offense which it is alleged the accused conspired to commit.

It is further insisted that by reason of this particular substantial defect in the indictment, the petitioner's rights, guaranteed by the Constitution of the United States were violated. His right not to be placed twice in jeopardy for the same offense; his right to due process, and his right to be informed of the nature of the charge against him were each violated.

We contend that when an indictment is thus defective and violates any one of these constitutional rights a judgment based upon it is void, and the defendant, being imprisoned by virtue of such judgment is entitled, as a matter of right, to be discharged through a writ of *habeas corpus*. This is settled law according to the decisions of the United States Supreme Court and of the Federal Courts, which will be cited and excerpts from a number of them quoted.

The count of the indictment here in question has attempted to charge the accused with conspiracy to endeavor to obstruct the due administration of justice in a case which for brevity we will refer to as "the Italo case," then pending in the United States District Court. It is charged that the accused conspired to corruptly influence "the persons acting for and on behalf of the United States in an official function, and under and by authority of the laws of the United States and before whom, in their official capacity, said question, matter, cause and proceeding was pending, and to do acts," etc.

In almost identical words this language is repeated several times in the charge, but nowhere does the indictment set forth a single fact to identify any of the "persons" whom it alleges the accused conspired to corruptly influence; nowhere does it set forth a single fact to identify or particularize the "official functions" of any such persons or the "official capacity" of any of these "persons." Nowhere does it identify the substantive offense which it is charged the accused conspired to commit. This is not a case of an indictment pleading facts indirectly and inferentially, and hence, arguable as to whether or not the defendants were sufficiently informed of the nature of the charge, and as to the possibility of it affording them protection against double jeopardy, and providing due process. This indictment does not set forth *any* facts to comply with the provisions of the Constitution, which guarantees each of these rights to every person accused of an offense against the United States.

Identification of Substantive Offense Is an Essential Ingredient.

That the identification and particularization of those persons conspired to be influenced and of their official functions or of their official capacities is, in itself, an essential ingredient of the offense here attempted to be charged, is obvious and it is also well established law. Without it the substantive offense is wholly unidentified. It will be seen that in each of the cases which will now be cited the indictment attempted to charge the same offense as does the instant indictment, or one of precisely the same class.

Kellerman v. U. S., 295 Fed. 796, establishes every legal principle necessary to entitle this petitioner to the relief sought, except as that case is not a proceeding in *habeas corpus,* it does not rule upon his right to this particular remedy. However, elsewhere we have a wealth of authority as to that right. This case does hold that the language used in this indictment and which we have quoted is generic only; that it is therefore the mere conclusion of the pleader; that it is wholly insufficient; that it violates the defendant's constitutional rights to be protected by the indictment from double jeopardy, and to be informed of the nature of the charge against him, and it does declare that the particular element of an offense not distinguishable in principle from that which we are now discussing is an essential ingredient of such an offense, without the pleading of which the indictment states no offense. The statute on which the indictment in that case was based denounces bribery of "any officer of the United States" or of "any person acting for or on behalf of the United States in any official function." The first count described the offense, as to this element, in this

generic language of the statute, only; this was held to be wholly insufficient, quoting *U. S. v. Cruickshank,* 92 U. S. 542, and other leading cases which declare that to charge this essential ingredient, *facts* and not mere conclusions of the pleader must be set forth. In the *Kellerman* case the indictment named the person whom it was charged the accused attempted to bribe, but it was held that this was not enough; that "the office or the official function of the one to whom the bribe was offered, as a person within the class described in the statute, are *facts* which must be alleged *in the indictment,*" and "that this omission is a defect in *substance* and is not cured by verdict or plea of guilty." (Italics ours.)

By way of contrast, in *Krishman v. U. S.,* 256 U. S. 992, we have an example of an indictment properly drawn, as far as setting forth this particular ingredient is concerned. The indictment named the person, and also named his official capacity and function. Krishman was thus enabled to appeal from a denial of a motion in arrest of judgment and to secure a reversal because the indictment showed that the officer alleged to have been corrupted had no official function which placed him within the class of persons described in the statute.

In *Taffe v. U. S.,* 86 Fed. 113, the indictment was drawn under R. S. 5440. The indictment charged the defendants with conspiracy to "corruptly endeavor to influence a petit jury of the United States," using the mere language of the statute. It was held to state no offense, and that to prosecute the defendants under it would violate both the 5th and 6th amendments to the Constitution. The opinion points out that to charge an offense similar in nature to that here attempted to be

charged, an allegation of the *identity* and *official functions* and *official capacity* of the person whom it is charged the accused conspired to corruptly influence, is an essential and a vital ingredient. Having declared that the use of the above quoted generic language was wholly insufficient, it is said that count one thus contained no averment in particularity of the individuals on the jury to be corrupted, by which the defendants might be apprised of the case so as to meet it, thus violating the 5th amendment. As to count two it was said, "the same lack of pleading *facts* exists," and especially, "nor does it appear who comprised the jury, nor what jurors were intended to be influenced." The *Taffe* decision is further worthy of note because the charge was conspiracy. It this eliminates any issue about less particularity being required where the charge is conspiracy than where it is of the substantive offense.

In *Anderson v. U. S.*, 260 U. S. 557, it is said:

> "As the conspiracy is the gist of the offense, it is undobtedly true that the offense which it charged the defendants conspired to commit need not be stated with that particularity that would be required in an indictment charging the offense itself. Still, as was said in Williamson v. U. S., 207 U. S. 447, 'the offense which the defendants conspired to commit must be identified.' "

Other conspiracy cases to the same effect are *U. S. v. Cruickshank, supra; Brenner v. U. S.*, 237 Fed. 636; *Conrad v. U. S.*, 127 Fed. 798; *McKenna v. U. S.*, 127 Fed. 88.

We apprehend that no decision will be found where an indictment has been sustained in which there was an entire

lack of pleading facts in specie to set forth an essential ingredient. It is only where some facts are pleaded, and the issue is whether they are sufficient to inform the accused of the nature of the charge, that the courts have said that less particularity will suffice in charging conspiracy than in alleging the substantive offense.

The instant indictment names no one whom it is charged the accused intended to influence; it fails to name the function of any such person, or the official capacity of any such person. There is no attempt to individualize this charge so that the defendants would, through it, have protection against being again placed in jeopardy for the same offense. It gives absolutely no information which would inform the defendants as to any fact whatsoever upon which the grand jury made the charge that the defendants conspired to influence anyone on earth. The *Taffe* decision declares that such an indictment charges no offense and is wholly insufficient.

Milner v. U. S., 36 Fed. 890, squarely determines that in charging the offense of conspiracy to obstruct the due administration of justice, to particularize in identifying the person conspired to be corruptly influenced, and his official function or capacity, is an essential ingredient, without which the indictment states no offense. The charge as to this element was that the accused conspired to influence "the officers of the United States acting under the authority of the United States, for the Southern Division of the Northern District of Alabama, and before whom said suits were pending," by means of tendering and agreeing to give said officers sums of money. It was held that this "is a description too indefinite to identify either the agreement or tender, and to inform the defend-

ant of the nature of the charge against him." And again referring to the agreement, it is said: "It is not charged as written or oral, active or passive, and is left uncertain as to matter and persons; all of which is of more importance, as the grand jury seems to have been fully advised of all the facts relating to the alleged act."

It is obvious that "the persons" referred to in the language quoted above from the instant indictment might be of the Attorney General's office, or of the judiciary, or of any one of a number of divisions of the Department of Justice. Were the defendants to be prosecuted by another indictment in which some member of one of these branches of the Government were named and his official function specified or his office named, of course a plea of former jeopardy would be futile. This indictment would furnish no protection. And how could the defendants know how to prepare a defense against such a generic charge. They are presumed to be innocent. They can have no basis to suppose that the evidence which the Government proposes to produce will identify any particular person rather than any other of the classes before whom it might be said that the *Italo* case was pending, involving probably thousands of persons. But the reasons for holding as the *Kellerman, Taffe, Milner, Pettibone, Van Wert* and *Cruickshank* decisions are better stated than we could hope to express them. This is especially true of the *Cruickshank* decision which may well be said to be a classic.

Other decisions to which we refer on this are *Waugh v. Aderhold,* 52 Fed. (2d) 702; *White v. Levine,* 40 Fed. (2d) 502; *McKenna v. U. S.,* 127 Fed. 88; *Johnson v. U. S.,* 294 Fed. 753; and *Keck v. U. S.,* 174 U. S. 434.

In each of these cases the respective indictments were held to be void and not capable of conferring jurisdiction, because lacking an essential ingredient of the offense attempted to be charged, which was either pleaded in the generic words of a generically worded statute, or as to which there was no pleading at all. In each case the lacking ingredient is analogous to that which is not set forth here.

The *Keck* decision is especially illuminating. It is by the Supreme Court, 172 U. S. 434. The charge was illegal importation.

It is said that where as was the case there, the statute only describes the general nature of the offense prohibited, and the indictment repeats the averments in the language of the statute, no facts are alleged and the indictment states no offense, and no issues to submit to the jury. This was held to be true of the first count.

The same issue was raised in somewhat different form as to the second count; the statute prohibited "fraudulently or knowingly importing or bringing into the United States any merchandise." It was held that this was generic language and really meant to denounce smuggling. The opinion points out that smuggling may be accomplished under the statute in any one of many ways, and since the indictment did not state facts, as distinguished from the generic conclusions sufficient to constitute any of the different ways by which the offense might be committed, the indictment was insufficient to state an offense.

Likewise here, obstructing the due administration of justice may be accomplished in many ways. This use of the generic language alleges no facts constituting any one

of them. The dismissal of the *Italo* case might have been accomplished by bribing the judge; or by using political influence on the department of justice, or some member of it; inducing him to suppress evidence; it might be by paying the local United States district attorney money to bring about the dismissal; many ways indeed might be suggested.

The defendants were not informed by this charge as to which of these ways it was contended by the Government that the accused had conspired to bring this result about.

As pointed out in the *Keck* decision, too, the purpose, that of bringing merchandise into the United States was not unlawful in itself. It could become unlawful only if the means to be employed were unlawful. In such cases the *Keck* opinion declares the means must be set out with the utmost particularity.

Here, the dismissal of a case is not unlawful; it becomes so only when corrupt means are employed.

In *Pettibone v. U. S.,* 147 U. S. 197, where the charge was conspiracy to obstruct the due administration of justice, we find this pertinent language: "The official character that creates the offense and the scienter is necessary." The official character referred to is that of the officer or court upon whom the attempt to obstruct justice in a particular case is conspired to be made.

The test commonly used to determine whether an element of an offense is an essential ingredient of it or merely part of the description, pertaining to mere uncer-

tainty and lack of precision and therefore a matter of form only, and not pertaining to the substance of the offense is: If the element was omitted from the indictment altogether would it still state an offense? Applied to this indictment the asking of the question is its own answer. If this generic language, "the persons acting for and on behalf of the United States in an official function," etc., were omitted from the indictment, of course no offense would be stated. Or suppose the indictment had averred that the accused conspired to influence corruptly "someone," and stopped there as to that element, would an offense have been set forth? Surely no one would contend that it would. Why? Because it is no offense to influence, no matter how corruptly, the action or the decision of anyone about a cause or matter with which that person has nothing to do. The "someone" must be a person acting for and on behalf of the United States in an official function under or by authority of some department or office of the Government of the United States. But while it must be shown that he is someone having such a function and official authority, it is the settled law as declared in the *Kellerman* case, that since these terms are general, to merely employ them in the averment of the ingredient which is thus essential, amounts to nothing more than the statement of the bald conclusions of the pleader, and is as though nothing had been said on the subject or as though it had stopped with averring that the accused conspired to induce someone to dismiss the *Italo* case.

This Language Is Merely Generic.

The language of which complaint is here made is the generic language of the statutes under which the instant indictment was drawn. (18 U. S. C. A., 88, 91 and 241.) The generic character of the words employed will hardly be disputed. However, since in numerous cases they have been so held, several decisions so deciding will be mentioned. These unhesitatingly and without the citation of authority decide that language almost identical with that used in this indictment is generic. Such decisions are *Kellerman v. U. S.; U. S. v. Taffe,* and *Milner v. U. S.,* all *supra.*

U. S. v. Van Wert, 195 Fed. 974, is another case directly decisive of this matter. The offense charged was of the same general character as the one attempted to be charged in the instant indictment. It was under section 17 of the Penal Code which reads: "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity under and by virtue of the authority of any department or office of the Government thereof" shall accept a bribe "with intent to have his decision on any matter, question, cause or proceeding pending * * * before him in his official capacity * * * shall be fined," etc. It was held that this language is generic, and that that part of the indictment which used it was entirely insufficient to charge an offense because there was no allegation as to what official duty of defendant was conspired to be influenced; and this was held to be essential.

If an Essential Ingredient Is Lacking No Offense Is Charged.

With the thesis securely established that to particularize the substantive offense is an essential ingredient of the charge of conspiracy to endeavor to obstruct the due administration of justice and also that the language of the instant indictment is generic only, and the mere quoted language of a generically worded statute, we proceed to place before the court the authorities which show it to be settled law that an indictment whose charge omits to set forth *facts* constituting an essential ingredient of the offense attempted to be charged, states *no offense* against the United States; and further that the use of generic language, only, to state such an essential ingredient, *amounts to nothing.* It cannot be considered in lieu of the necessary allegation of facts. The logic leading to these conclusions is clear and the authorities are numerous and positive. We venture the assertion that there are no decisions holding to the contrary.

Many decisions refer to *U. S. v. Cruickshank,* 92 U. S. 542. There, the statute made it unlawful to conspire with intent to hinder a citizen in the free enjoyment of *any* right or privilege granted by the Constitution. Two fatal defects were held to exist in the indictment. They were lack of averment of the specific intent required and failure to specify *what* rights were conspired to be hindered. The last named element was charged only in the generic language of the law. The court declares:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall

charge the offense in the same generic terms as in the definition, but it must state the species,—it must descend to particulars. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

"All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

The analogy of this clear exposition of the well established law to the instant indictment is plain. Substitute "persons" for "rights" and it is complete. Just as the statute which was involved in the *Cruickshank* case made

criminal a "combination with an intent to prevent the enjoyment of *any right* granted or secured by the Constitution" so the statute under which the present indictment was drawn makes criminal a combination with the object to corruptly influence the decision and action of *any persons* acting on behalf of the United States in an official function, etc. And, as all rights are not secured by the Constitution and therefore it was a question of law to be decided by the court whether one is so or not, here also, all persons are not acting on behalf of the United States in an official function, etc., and it was a question of law *for the court* whether the particular ones alleged to be conspired to be influenced were such. It is not a question "to be decided by the prosecutor". Therefore, the names of the "persons" and their official functions or official capacities become an essential ingredient of the offense, which can not be supplied by quoting the generic language of the statute only, and without which, no offense against the United States is stated.

In *Collins v. U. S.,* 253 Fed. 609, decided in this Ninth Circuit, it is held that an indictment which pleads an essential ingredient of the offense attempted to be charged in the generic language only, *states no offense known to the law.* It is said that such pleading constitutes nothing more than "the sheerest conclusion". To the same effect are *U. S. v. Green,* 136 Fed. 618; *Martin v. U. S.,* 168 Fed. 198; *Floren v. U. S.,* 186 Fed. 96; *Shaw v. U. S.,* 292 Fed. 339; *Grimsby v. U. S.,* 50 Fed. (2d) 509; *Pettibone v. U. S.,* 147 U. S. 197; *Boykin v. U. S.,* 11 Fed. (2d) 484; *U. S. v. Taffe,* 86 Fed. 115; and *Eckert v. U. S., 7* Fed. (2d) 257.

Another case from the Ninth Circuit, *Foster v. U. S.,* 253 Fed. 481, declares that such generic pleading of an essential element sets forth only the mere conclusions of the pleader and renders the indictment a *nullity* and "dead". See also *Hess v. U. S.,* 153 U. S. 587.

Another often quoted authority friom this circuit is *U. S. v. Armstrong,* 59 Fed. 568. The charge, as in the instant indictment, was conspiracy to obstruct the due administration of justice. Citing the *Cruickshank, Carll* and other leading decisions, it was held that the indictment was fatally defective, because only generic words had been employed.

In all of the cases cited under this heading, the theory upon which the conclusion is reached that the mere use of generic language to charge an essential ingredient is a nullity and wholly insufficient to confer jurisdiction, is, that the indictment must allege *facts,* not mere conclusions of the pleader; that generic language constitutes the "sheerest conclusions" only. Hence that where generic language *only* is used to charge an essential ingredient, there is an *utter lack of any pleading* of that ingredient, and of course, it results that *no offense whatever is charged.*

An indictment which fails to set forth facts to charge any essential ingredient of the offense attempted to be charged is *void* for any purpose; this defect is one of substance and not merely of form. It goes to the very life of the charge. The following decisions so hold:

Blitz v. U. S., 153 U. S. 306; *Carll v. U. S., supra; U. S. v. Ford,* 34 Fed. 26; *Reimer-Cross v. U. S.,* 20 Fed. (2d) 36; *Jarl v. U. S., supra; U. S. v. Green, supra.* In each of these cases generic language of the statute was used and also some facts were set forth from which it was argued that the lacking ingredient was sufficiently pleaded. But the courts held to the contrary and condemned the indictments as wholly insufficient.

A Ninth Circuit case, *Salla v. U. S.,* 104 Fed. 544, also declares that where an essential ingredient is pleaded in generic language only, the indictment fails to state an offense against the United States.

Where the indictment fails to state an essential ingredient of the offense, the court lacks jurisdiction over the subject matter. *U. S. v. Rogoff,* 163 Fed. 311, was a case in which an indictment was returned attempting to charge perjury in a bankruptcy proceeding. After the jury was impanelled but before any evidence was taken the action was dismissed on the ground that the indictment failed to show facts sufficient to constitute a crime, in that there was no allegation that the bankruptcy proceeding was pending in any court of the United States. After the dismissal the court directed a verdict for the defendant. A second indictment was then returned charging the same offense. In denying defendant's plea of double jeopardy the court held that the first indictment was a nullity and insufficient to charge a crime, and hence, insufficient to place the accused in jeopardy. It was pointed out that while the court had jurisdiction of the person *it did not have jurisdiction over the subject matter of the offense attempted to be charged, because no offense was charged.*

Indictment Is Void If Constitutional Rights Violated; Habeas Corpus Proper Remedy.

But it is not merely the fact that the indictment under which the petitioner herein was convicted fails to state an offense against the United States which entitles him to be discharged on *habeas corpus*. For other and perhaps more vital and cogent reasons this same defect in the indictment gives him a constitutional right to such discharge. It may be more accurate to say that the fundamental reasons back of the rule that makes void an indictment which omits an essential ingredient or avers it in generic language only, is that the constitutional rights of the accused are thereby violated.

Approaching the issue with this thought in mind, reference is again made to the *Cruickshank* case. Indeed, the petitioner herein might well rest on this decision alone. It points out that without something more than a charge in generic terms, the constitutional right of the accused to be informed of the nature of the charge against him is violated; and that it again violates the guaranty that no one shall be twice placed in jeopardy for the same offense. Other cases point out that for a defendant to be forced to trial on an indictment thus defective is subversive of the inhibition of the 5th amendment against prosecution without due process of law.

Several cases stress the point that an indictment of this character does not protect against double jeopardy. It must be remembered that, as declared in *Bens v. U. S.*, 226 Fed. 152, and *Nielsen v. U. S., supra,* the constitutional inhibition against double jeopardy begins back of the judgment and back of the trial. It begins with the charge of the offense itself. In *Jarl v. U. S., supra,* it is

said that one of the purposes of the indictment is "to identify the charge so that the defendant may not be put on trial for an offense other than the one covered in the indictment; to enable him to prepare his defense; and to protect him on the record in his constitutional right from being twice *put in jeopardy* for the same offense."

The following additional authorities assert the law to be that where the indictment charges any essential element of the offense in generic language only, it will not protect the accused against a violation of the guaranty against double jeopardy, and that such an indictment is therefore wholly insufficient: *U. S. v. Hess, supra; Ledbetter v. U. S.,* 170 U. S. 610; *Evans v. U. S.,* 124 U. S. 487; *Keck v. U. S., supra; Anderson v. U. S.,* 260 Fed. 557; and *Kellerman v. U. S., supra.* The same exposition of the law is found in *Reimer-Cross v. U. S.* and *Jarl v. U. S.,* both *supra.*

If the indictment does not inform the accused of the nature of the charge against him it is a nullity; he may attack it collaterally and be freed. This follows for the same reasons just discussed in connection with one which fails to protect the accused against double jeopardy. The *Cruickshank* case includes this reason, among others, for holding the indictment wholly insufficient. Nearly all of the cases cited under the last heading do the same, including *Hess, Foster, Carll, Floren, Kellerman, Pettibone, Taffe,* and *Evans* cases; also *Grimsley v. U. S.,* 50 Fed. (2d) 509; *Peters v. U. S.,* 94 Fed. 127; *U. S. v. Dowling,* 278 Fed. 730; and *Boykin v. U. S.,* 11 Fed. (2d) 484.

In each of these indictments the insufficiency or the ground of attack was the pleading of some essential ingredient in the generic words of the statute. From *Boykin v. U. S., supra,* we quote:

> "Where a statute is general, it is not sufficient merely to follow its language in an indictment, but the indictment must allege the specific offense coming under the general description of the statute, in order that the accused may enjoy the right, secured by the Sixth amendment, 'to be informed of the nature and cause of the accusation against him.' "

Similar language is found in the *Collins* and *Foster* cases, both of which are from the Ninth Circuit. This principle has been affirmed by the United States Supreme Court in a number of decisions, among which is *Simmons v. U. S.,* 94 U. S. 360.

If Indictment States No Offense Petitioner Is Entitled to Habeas Corpus.

In the preceding presentation of the preliminary question of the right of petitioner to be heard by the District Court and to attack the judgment of this court collaterally, the decisions rendered in a number of *habeas corpus* proceedings were cited to the point then being presented. It is now in order to refer to those cases and others as authority that petitioner is entitled to be discharged for the reason that the indictment charges no offense against the United States and that the judgment is void upon that and the constitutional grounds which have been set forth.

Attention is first called to the fact that *habeas corpus* is a writ of right. It has been so held in *Bens v. U. S.,* 266 Fed. 152; *Stevens v. McLaughrey,* 207 Fed. 544; R. S. 755.

One who is deprived of his liberty under a judgment which denies him a constitutional right is entitled to be discharged on *habeas corpus.* (*In re Siebold,* 100 U. S. 371; *Nielsen v. U. S.,* 131 U. S. 176; *Munn v. Barber,* 136 Fed. 313; *Mackay v. Miller,* 126 Fed. 161; and *Colson v. Aderhold,* 5 Fed. Supp. 111.)

Directly to the point, if an indictment is so defective that it will not protect the accused against the violation of guaranty in the fifth amendment against double jeopardy, a writ of *habeas corpus* is a proper remedy to which he is entitled as a right. (See *Bens v. U. S., Stevens v. McClaughry,* and *Nielsen v. U. S., supra; Sprague v. Aderhold,* 45 Fed. (2d) 790.) In this last case it is said that *habeas corpus* cannot be used to correct mere error but that

> "It is believed, however, that no court has refused to inquire, on *habeas corpus,* whether one is really being punished twice for the same offense, although clearly, former jeopardy if it occurred in the previous trial, and, if in the same trial, may and ought to be urged before sentence, and inquired into by the trial court."

An indictment which charges any essential ingredient of the offense attempted to be averred in generic language only, will not protect the accused against violation of the guaranty against double jeopardy. (*Cruickshank, Hess, Ledbetter, Evans, Keck,* and *Anderson* cases, all *supra.*)

It has been shown to the point of demonstration, that the instant indictment pleads the essential element of the identity of the offense which it charges the accused conspired to commit in the generic language only. Also, by the authorities last cited and others heretofore cited and quoted from on page 27 herein, that when the charge is in such generic words only it charges no public offense and does not protect the accused against double jeopardy. Hence, it follows that he has a right to be discharged through this *habeas corpus* proceeding.

Where any essential ingredient of the offense is set forth only in the generic language with no pleading in specie of facts as to such element, it fails to inform the defendant of the nature of the charge against him as provided by the sixth amendment. (See *Cruickshank, Keck, Floren, Ford,* and *Armstrong* cases, all *supra.*)

Where the rights of the petitioner which are guaranteed by the sixth amendment, to be informed of the nature of the charge against him are violated he is entitled to discharge on *habeas corpus.* (*Mackay v. Miller,* 126 Fed. 161; *Manning v. Biddle,* 14 Fed. (2d) 518; *Waugh v. Aderhold,* 52 Fed. (2d) 702; *Aderhold v. Schlitz,* 73 Fed. (2d) 381.) These cases also hold that if the indictment charges no offense known to the law *habeas corpus* is a proper remedy, and on page 28 *et seq.* of this brief we have shown that an indictment which pleads any essential ingredient of the offense attempted to be charged in generic language only, it charges no offense against the

United States. Hence, in the instant proceeding, the petitioner is entitled to be discharged on *habeas corpus*.

The indictment under which this petitioner was convicted charged the accused with conspiracy. The charge was that the accused conspired to commit the substantive offense of endeavoring to obstruct the due administration of justice; it was averred that they conspired to do this by corruptly bringing about the dismissal of the *Italo* case by influencing the action of "the persons acting for and on behalf of the United States in an official function, and under the authority of the United States, and before whom in their official capacity, said criminal proceeding was pending."

The substantive offense is not otherwise described or identified. No facts are pleaded. No official is named as one whom the accused conspired to influence; neither the official function of any such official nor his official capacity is stated. The name of no such official is mentioned. The language is wholly and typically generic. The indictment charges no offense against the United States. It did not guarantee the accused against further jeopardy for the offense attempted to be charged. It did not inform him at all as to the nature of the charge. It did not provide him with due process. It is void, "dead", "wholly insufficient for any purpose". It provides "no issue on which the case could be submitted to the jury". It is a "nullity" and it cannot confer jurisdiction. A judgment based upon it is void and affords no justification for a commitment or the imprisonment of the defendant, this petitioner.

Former Acquittal of Charge Entitles Petitioner to Release.

This petition alleges that previous to his trial and conviction of the offense for which he is now imprisoned he was acquitted by a judgment of the United States District Court whose language was "Or rather, instead of dismissing, judgment for the defendants on count one.", which judgment was duly entered by the clerk. (Ex. F.)

Any judgment whose legal effect is an acquittal is a bar to further prosecution for the same offense as *res adjudicata*. (*U. S. v. Oppenheimer,* 242 U. S. 309; *U. S. v. Myerson,* 24 Fed. (2d) 855; *U. S. v. Morse,* 24 Fed. (2d) 1001; and *Coffey v. U. S.,* 116 U. S. 436.)

The import of a judgment is to be determined by its words. In the absence of fraud extrinsic proof is not admissible to explain it. (*Lyon v. Pettin, etc. Co.,* 125 U. S. 698; *Louis v. Wabash R. Co.,* 152 Fed. 849; *Long v. Long,* 44 S. W. 341 (Mo.).)

A judgment, duly and regularly made, which is not void for want of jurisdiction, even though irregular, cannot be attacked collaterally. (*Ex Parte Roe,* 234 U. S. 70; *U. S. v. Rothstein,* 187 Fed. 268; *Manson v. Duncanson,* 166 U. S. 533; *Kansas v. Morgan,* 76 Fed. 429.)

Such a judgment is *res adjudicata* as to all issues directly decided by it as between the United States and Gavin W. Craig, in any suit for the same or for any other cause. (*Southern Pac. Co. v. U. S.,* 168 U. S. 1.)

Each of the foregoing propositions are elementary and settled law. Put together and applied to the facts as shown by the record we see no escape from the conclusion that petitioner has been acquitted of the identical offense

for which he is now imprisoned, under a judgment which must be void.

It surely will not be disputed that the District Court had jurisdiction to acquit the defendants. It had jurisdiction of the persons of the defendants and of the subject matter of the offense charged in the indictment. Unlike the indictment under which this petitioner was later convicted and imprisoned, this indictment stated a public offense. It named the persons whom it charged the accused conspired to corrupt; it specified their official capacities. It set forth that these persons were Samuel McNabb, and William B. Mitchell, United States District Attorney for the Southern District of California, and Attorney General of the United States, respectively.

It cannot be denied that the court had plenary power to acquit the defendants either by dismissing count one of the indictment of its own motion after they had been placed in jeopardy or to have directed the jury to acquit. It chose to use the method of rendering judgment for the defendants.

The Government might have appealed from this judgment, had it doubted its validity. There are other appropriate means of attacking it directly. It cannot do so collaterally, except on the ground that it is void or was obtained by fraud, and obviously neither of these grounds is available.

The two indictments here involved themselves evidence that the first charges, and the second attempts to charge, the same offense. If more is needed the testimony of the Government's witnesses, set forth in Exhibit C, page 230, attached to the petition, shows beyond the possibility of questioning that identically the same offense was prose-

cuted in both cases. We have no reason to believe that the identity of the charges will be disputed by the Government.

To complete the demonstration that petitioner is entitled, as a matter of right, to have this writ issued and to be discharged from custody, it remains only to cite a few decisions of the Supreme and Federal Courts. We believe that there is no legal proposition more universally accepted and everywhere unquestioned than that a prisoner is entitled to release on *habeas corpus* where it appears that he had been acquitted of the offense for which he is held in custody.

In *Nielsen v. U. S.*, 131 U. S. 176, the petitioner was discharged on *habeas corpus* because it appeared that he had been convicted of the same offense for the commission of which he was imprisoned. It is declared that if the fact of double conviction for the same offense "appears in the indictment or anywhere else in the record" it is sufficient. And again, that a party is entitled to *habeas corpus* not merely where the court is without jurisdiction or power to condemn the defendant; that the rule "*in favorem libertatis*" should prevail, and "If we have seemed to hold the contrary in any case, it has been from inadvertence."

In *Bens v. U. S.*, 266 Fed. 152, it was alleged in the petition that the petitioner had been previously acquitted of the offense for which he was in custody. In the opinion it is said

> "if he is twice put in jeopardy, if he is put upon trial a second time for an offense of which he has been once acquitted or convicted: there is no power in any court to try him the second time, and a sec-

ond judgment would be, not merely erroneous, but absolutely void. If the petitioner herein is being held for a crime of which he has already been acquitted, the court below is without power either to punish him again or to try him again for that offense; and in such a case he has a right through the writ of *habeas corpus* to obtain his discharge, if the two offenses are the same."

Halligan v. Wayne, 179 Fed. 112 (9th Cir.). Petitioner, having pleaded guilty to four counts of the same indictment served sentence under the first count. He was then released on *habeas corpus* because it was held that since but one offense was charged in the indictment the sentences under the last three counts were void. Upon similar grounds prisoners were released in the following cases: *In re Snow,* 120 U. S. 274; *Colson v. U. S.,* 5 Fed. Supp. 111; *Ex Parte Lagomarsino,* 13 Fed. Supp. 947; *Bertsch v. Snook,* 36 Fed. 2d) 155. In all of these cases the release was based upon the proposition as stated in *Ballerini v. Aderholt,* 44 Fed. (2d) 352, that "under the fifth amendment one may not for the same offense be twice put in jeopardy."

As held in these cases, this petitioner having been acquitted of the offense charged in the indictment under which he stands convicted, no court had power to try him again for that offense, much less to sentence him for it.

Whether the court's lack of power is merely to sentence, or is jurisdiction of the subject matter of the offense, "or for any other reason", *habeas corpus* will discharge the priosoner. (*Mackay v. Miller,* 126 Fed. 161 (9th Cir.).)

But surely the law is too well settled on this issue to need further authority.

Allegation Concerning Agreement to Influence Officials Insufficient.

The last indictment avers no facts showing that the petitioner agreed to pay or to offer to pay anyone anything or to use any other means to bring about the dismissal of the *Italo* case. In generic terms only this allegation is attempted to be made. The mere reading of the language is sufficient to satisfy one that it is generic and that no facts whatsoever are set forth in that behalf. The authorities which we have cited heretofore, especially the *Taffe* and *Milner* cases, are applicable here.

The Indictment Charges Only an Inchoate and Conditional Agreement Between the Alleged Conspirators.

We rest our argument concerning this ground upon the language of the indictment and the opinion of the Hon. James A. Fee in passing upon a former indictment of the same persons indicted under the instant indictment and for the same offense. In so far as this issue is concerned the two indictments are not distinguishable. We are assured that the authorities cited in Judge Fee's opinion fully sustain his holding that the indictment failed to state a public offense, because the facts set forth showed no completed agreement to do anything; that the negotiations averred never reached the stage of a completed conspiracy, and hence did not violate the statutes of the United States.

The Fee opinion reads as follows:

> "The gist of the crime of conspiracy is the unlawful agreement to commit an offense against the United States. Acts which tend to accomplish the object but which are performed prior to the forma-

tion of the conspiracy are of no value. Morrow v. U. S., 11 Fed. (2d) 256; U. S. v. Grodson, 164 Fed. 157; Minner v. U. S., 57 Fed. (2d) 506, 511. Conferences at which the conspiracy was formed and acts done for the purpose of arriving at a concert of action belong to the period of formation. Dahly v. U. S., 50 Fed. (2d) 37, 42. Furthermore, acts done in order to obtain the adherence of a particular person to the plan belong to the embryonic stage, since defendants must be definitely committed to co-operate for the accomplishment of the object or no conspiracy exists. See U. S. v. Mundy, 186 Fed. 375, 377. In an indictment for this crime facts must be positively set forth, therefore, which establish that the stage of negotiation had passed, and which body forth the full fledged conspiracy into unconditional adhesion of each defendant thereto.

Tested by these principles Count One of the instant indictment is fatally defective. It is alleged that the defendants 'were in consideration of the payment to them of a large sum of money, to-wit, fifty thousand dollars, to promise, offer and give' money to the officials in charge of a certain prosecution. This statement avers that the adherence of the defendants to the scheme of bribing the officials was to be obtained by the *payment* of a large sum of money *to them.* The bargaining for their adherence was an essential part of the formulation of the conspiracy. *Ex parte* Black, 147 Fed. 832, 838. This money was not paid to the defendants, and under the allegations of this indictment none of them therefore engaged definitely to offer money to the officials and none became members of the conspiracy.

A similar indictment was upheld in Felder v. U. S., 9 Fed. (2d) 872, but this particular point was not present. If the indictment in that case be taken as a whole, it will be found the allegations show that the defendants each received more than the sum alleged as a consideration for their co-operation. Thus the price was paid and the adherence of each of the defendants secured to the conspiracy, and the promise of each to offer money to the officials was in effect. Beyond this, the appellate court reviewing that case had before it proof of an unconditional agreement by defendants to carry out the object of the conspiracy and proof of the receipt of large sums of money in consideration for their agreement to bribe officials. In view of the verdict of guilty by a jury on these facts the conditional manner of statement of the promise might well have been disregarded, since the indictment and proof showed the condition so stated had been fulfilled.

But the error in the instant case had been made in attempting to adapt that indictment to a different state of facts without either discarding the language there used as inapplicable to the facts here or showing the fulfillment of the condition on the face of the indictment. Here two of the defendants, according to the allegations, received no money, and the third only minor sums. There is thus no definite statement that defendants agreed to offer money to the officials to influence their conduct. It is alleged they conspired to commit 'divers offenses'. But that is a conclusion. U. S. v. Eisenminger, 16 Fed. (2d) 816, 817; U. S. v. Dowling, 278 Fed. 630, 631. The clause beginning with 'according' might appropriately have been used to set out the means of accomplishing an unlawful purpose. It may be that this defect

is an inaccuracy only in the method of stating the facts. However, the face of the indictment must control, and it does not say that any definite agreement was entered by defendants nor that any of them unconditionally adhere to the conspiracy. Asgill v. U. S., 60 Fed. (2d) 780."

Conclusion.

It has been shown conclusively that the judgment of conviction is void, because the indictment fails to state any offense against the United States and violates petitioner's constitutional rights.

It appears from the record presented that petitioner was previously acquitted of the offense for which he is now in prison; hence he is entitled as a matter of right to release on a petition for a writ of *habeas corpus* and it is respectfully submitted that the order of the District Court denying said petition be reversed.

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GAVIN W. CRAIG,
In Propria Personam.

8395

No. ~~8385~~

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of
GAVIN W. CRAIG
For a Writ of Habeas Corpus.

GAVIN W. CRAIG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

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SUBJECT INDEX

CITATIONS AND AUTHORITIES

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BRIEF OF APPELLEE

Addenda to Appellant's Statement of the Case

In his "Statement of the Case" appellant omits some steps that were taken that we believe should be in the mind of this court on this hearing. The statement of the case by appellant is to be found at pages 3, 4, 5 and 6 of appellant's brief. There should be added to that statement the fact that after the trial of the action an appeal was taken from the judgment of the trial court, to this court. On that appeal the judgment of the lower court was affirmed. Thereafter a petition to the Supreme Court of the United States for a writ of certiorari to this court was filed in the Supreme Court. On a hearing of that

petition the petition was denied without prejudice to a renewal of the application at the proper time. Thereafter an application to this court for a rehearing was duly made and the court considered that application and denied it. Thereafter a petition to the Supreme Court for a writ of certiorari to this court was duly filed in the Supreme Court of the United States. On hearing of that matter by the Supreme Court the petition was denied.

Since all of the foregoing facts pertaining to the procedure heretofore in this case are matters of record in this court we do not cite the dates and records of the matter since this court takes judicial notice of all of those facts pertaining to the procedure in this case.

Appellant's Questions on This Appeal

Appellant at pages 6 and 7 of his brief states the questions that are here on this appeal presented. Those propositions are laid down in serial numbers from 1 to 7 and question 3 is divided into two subparagraphs, and question 7 is divided into two subparagraphs. The answer to said questions 1, 2, 3, 4 and 7 we submit should be no. Questions 5 and 6 we believe need not be answered at all inasmuch as under the conditions of this hearing those propositions are not material.

Appellant's Stated Issues on This Appeal

At the top of page 8 of appellant's brief appellant sets forth in three propositions the issues to be presented to this court on this appeal. Those questions, however, are comprehended within the questions finally placed before this court by appellant in his brief at page 10.

Propositions of Law on This Appeal

Under the heading of "Preliminary Questions" propositions of law Nos. 1, 2, 3 and 4 are laid down by appellant at page 9 of his brief. These propositions apparently constitute the foundation of his claim of right to be released from prison on this hearing. It may be stated here that each of these propositions except proposition No. 4 is sound law. If proposition No. 4 means that upon a collateral attack in which attack it is claimed that the judgment is void the court will examine the face of the record and determine whether or not the original court had jurisdiction of the subject matter of the action, we would accept the proposition as law. At pages 10 and 11 of his brief appellant specifies the two actual grounds upon which he here asserts his claimed rights. This is under the caption "Two Principal Grounds New."

New Grounds of Appellant's Claimed Right

Neither of these so-called "new" propositions is *first* presented on this hearing. The first of the two propositions appearing on page 10 of appellant's brief when reduced to simple language is a claim by appellant that the indictment does not state facts sufficient to constitute a public offense. That matter was fully presented on the appeal from the judgment in this case and expressly passed upon by this court. This court in that opinion determined that the indictment was good against a demurrer both general and special. (*Craig v. United States*, 81 Fed. (2d) 822. The matter was not lightly passed over by this court but was considered closely and defi-

nitely. (See pages 821 and 822, *Craig v. United States,* 81 Fed. (2d), *supra.*) In conclusion this court after stating that there were twenty-five assignments of error continued:

> "We have here discussed, however, only those assignments that are argued in the briefs. As to the others, we might well have felt at liberty to disregard the points thereby raised. See *Forno v. Coyle,* (C. C. A. 9) 75 Fed. (2d) 692, 695, and cases there cited. Nevertheless, *we have examined all the other assignments* and have found them to be without merit." (Italics ours.)
>
> *Craig v. United States, supra,* page 831.

This court in passing upon the sufficiency of the indictment against the demurrer both general and special, and which was overruled by the trial court, necessarily examined all of the allegations of the indictment. It seems clear that if the point raised in so-called "new" proposition 1 of the above has any effect for the purpose of this hearing it would necessarily direct itself to the total insufficiency of the indictment to state a public offense, and was therefore passed upon on the general demurrer in the trial court and in this court.

In This Indictment For Conspiracy to Obstruct the Administration of Justice Names of Officers intended to be Influenced Need Not be Stated.

We do not, of course, concede that the failure to name the particular officers in charge, even though that had been necessary in this indictment, would take away from the trial court the jurisdiction to enter the judgment

entered herein. We contend that such would not be the effect since the allegations of the indictment clearly show that it seeks to state a public offense against laws of the United States, of which the trial court had jurisdiction as will appear hereinafter. So long as that situation obtains this court is without jurisdiction to release the appellant on this habeas corpus proceeding.

Pleas in Bar and Abatement

The second "new" proposition of appellant was also fully considered on the original appeal from the judgment in this case and was determined against the appellant here. (*Craig v. United States, supra,* pages 818, 819 and 820.) This court concluded, after a thorough discussion of the matter:

> "We believe that the court below was correct in granting the appellee's motion to strike the plea in bar and the plea of once in jeopardy."
>
> *Craig v. United States, supra,* page 820.

On this second "new" proposition we deem the authority of the trial court and of this court supported by the authorities cited by this court, all-sufficient to meet any contention made by appellant in his brief, and to settle the law of this case on this point. The Supreme Court having denied certiorari with the opinion of this court before it will be deemed to have held that the determination by the trial court and this court of the proposition under discussion is not only *the law of this case, but is the law.*

Insufficiency of the Indictment

The law in Federal jurisdictions and in California seems to be settled as to the first proposition of appellant, the insufficiency of the indictment.

> "The only question before us is whether the Police Court had jurisdiction. A *habeas corpus* proceeding can not be made to perform the function of a writ of error and we are not concerned with the question *whether the information was sufficient* or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the *court had jurisdiction to try the issues and to render the judgment. Ex parte Kearney,* 7 Wheat. 38; *Ex parte Watkins,* 3 Pet. 193; *Ex parte Parks,* 93 U. S. 18; *Ex parte Yarbrough,* 110 U. S. 651; *In re Coy,* 127 U. S. 731; *Gonzales v. Cunningham,* 164 U. S. 612; *In re Eckart,* 166 U. S. 481; *Storti v. Massachusetts,* 183 U. S. 138; *Dimmick v. Tompkins,* 194 U. S. 540; *Hyde v. Shine,* 199 U. S. 62, 83; *Whitney v. Dick,* 202 U. S. 132, 136; *Kaizo v. Henry,* 211 U.S. 146, 148." (With the exception of the words "habeas corpus" the italics above are ours.)
>
> *In the Matter of Gregory,* 219 U. S. 210, 213.

> "It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged. *Andrews v. Swarz,* 156 U. S. 272; *Bergemann v. Backer,* 157 U. S. 655; *In re Lennon,* 166 U. S. 548; *Felts v. Murphy,* 201 U. S. 123; *Valentine v. Mercer,* 201 U. S. 131; *Frank v. Mangum,* 237 U. S. 309."
>
> *Knewel v. Egan,* 268 U. S. 442, 445.

> "On habeas corpus the inquiry into the sufficiency of an indictment is limited We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus."
>
> *Ex parte Ruef,* 150 Cal. 605, 89 Pac. 605.

It seems clear from the foregoing authorities that this first "new" proposition raised by appellant can avail him nothing. It is clear that the indictment here undertakes to charge a crime against a Federal law, to-wit, a violation of Section 88, Title 18, *U. S. C. A.,* and that the conspiracy charged is a conspiracy to commit the second offense stated in Section 241, Title 18, *U. S. C. A.* It is not contended by appellant, and such a contention would be futile, that either Section 88 or Section 241, of Title 18, *U. S. C. A.* is unconstitutional. Therefore, if the contention of appellant could be entertained, and if it could be held that the failure to name the officers whom the conspirators conspired to influence renders the indictment totally deficient, yet since the statutes are constitutional and the court has jurisdiction of that character of crime, such defect in the indictment can not be reached on habeas corpus.

It Was Not Essential to the Validity of the Indictment in This Case to Allege or State in the Indictment the Names of the Particular Officers Whom the Defendants Conspired to Influence.

The persons having charge of the prosecution of crimes in the District Courts of the United States are the Attorney General and his assistants and the United States Attorney for the district in which the case is pending and his assistants and any special assistants of either the Attorney General or the United States Attorney that may be appointed and designated to prosecute the particular case. The Attorney General and his assistants and the United States Attorney in each district and his assistants respectively fill offices created by law and are severally appointed pursuant to law.

Courts take judicial notice of matters of common knowledge, of constitutions and laws of the United States of America and of the respective states.

16 *C. J.* 520, Section 967, and cases there cited.

The courts also take judicial notice of the names and official signatures of their own officers and generally of the officers of other courts before it.

16 *C. J.* 526, Section 987, and cases there cited.

As a rule matters of which the court must and will take judicial notice need not be stated in an indictment.

31 *C. J.* 670, Section 191;
Hill v. U. S., 275 Fed. 187, *189;*
In the Matter of Dunn, 212 U. S. 374, *386.*

It is a matter both of law and of common knowledge that the prosecuting officers change from time to time, and that the Attorney General and the United States Attorney who first have control of a particular case may have that control transferred to another either by designation under the law by the proper authority or by resignation or expiration of the term of office of the original officers in control. It is also known that the court who controls the procedure in the case may be the judge before whom the case originally came or another judge or judges, all pursuant to lawful acts of proper officers. It is clear, therefore, that the conspirators would probably not know what particular officer they would necessarily seek to influence, and therefore the general description of the officers that they conspired to seek to influence as set out in the indictment is definite and certain. It would in short be such officer or officers of the government of the United States as should at the time contemplated by the conspirators be in control of the particular case. That would include the Attorney General and any assistant or assistants of his that might be assigned to the particular case at any time, and it would, of course, contemplate whatever United States Attorney or assistant United States Attorney would at the time for approach by the conspirators be in charge and control of the particular case. It is therefore submitted that the conspiracy is properly charged when it states the character of the officers who would be sought by the conspirators to be influenced to dismiss the Italo case, when the time arrived in the mind of the conspirators for the approach, because since the statute fixes the duties of the

officers, and since the conduct and control of the Italo case was, under the statutes (Sections 481 to 488, Title 28, *U. S. C. A.*), in the hands of the United States Attorney for the Southern District of California and his assistants, subject to control by the Attorney General of the United States and his assistants, the conspiracy as charged was clearly to influence those officers regardless of the names of the persons who happened at any particular time to occupy those offices. As the allegations stand in the indictment it is clear that the intention of the conspirators was to obstruct justice by influencing any or all persons in the official position under the statute that gave them control of the Italo case. The conspirators no doubt were uninformed as to the name or names of the particular officers intended to be influenced, but intended to influence at such time as they should deem expedient whatever named persons occupied those official positions. They, in like manner as the courts, had knowledge of the existence of those official positions and likewise had knowledge that the officials having control of that case under the statutes might change from time to time. They contemplated according to the allegations of the indictment the obstruction of justice by influencing the officers, whoever they might be that had control of the Italo case. The allegations of the indictment are all sufficient to make it certain and to fully inform the defendants with certainty of the means that the conspirators intended to use for the purpose of consummating their crime of, not bribery of officers, but of *endeavoring to impede and obstruct justice.*

We believe that opposing counsel have confused the two crimes created by Section 241, Title 18, *U. S. C. A.*, the statute which the appellant here conspired with others to violate. The one crime created by that statute is the crime of corruptly or by threat or force endeavoring to influence, intimidate or impede any witness or officer or grand or petit juror in the discharge of his duties. That crime, of course, is specific and in order to charge that crime it would be necessary that the indictment allege the official capacity of the specific person sought to be thus impeded in the discharge of his duties. Where his name is known to the grand jurors the name, of course, should be given together with an allegation of the official position that he at the time of the alleged act of the defendant occupied. If his name is not known he should be otherwise described so as to make it certain what particular individual was sought to be impeded in the discharge of his duties as an officer. This is not necessary, however, in charging a conspiracy to impede or obstruct the administration of justice by those in whose hands that administration may be at the time of the attempted exercise of the influence. Officers in charge of the case to be influenced, as stated above, may be one set of persons one day and another set another day. They are, however, under the law existent officers at all times. If this indictment alleged the name of a particular officer and that particular officer died or resigned and thus went out of the lawful control of the Italo case, that would in such an event have terminated the conspiracy, but since it was the purpose of the conspirators to influence whatever person at any time during the life of the conspiracy

had charge and control of the Italo case it was not only proper to omit names, but, for certainty to the end of justice in the case, it was not necessary to allege that they conspired to influence a particular named person or particular named persons because the conspirators did not themselves thus limit the scope of their conspiracy. The conspiracy was therefore properly alleged to be a confederation for the purpose of endeavoring to impede and obstruct the administration of justice by influencing any officer of the United States by whatever name who should be in control of the Italo case during or within the life of the conspiracy in control of the Italo case. It was not necessary that the conspirators or any of them should know at the time of the inception of the conspiracy the name of a single member of the Department of Justice, or a single man in the office of the Attorney General of the United States or of the United States Attorney for the Southern District of California. They knew as a matter of law that some officer or officers of the United States would of necessity be in control of the Italo case. Those officers, whatever their names might be, were the ones that they conspired to influence as a means of endeavoring to obstruct justice in the Italo case.

It is not necessary, as stated above, in all cases that persons engaged in the commission of the substantive offenses, the first one created by Section 241, Title 18, *U. S. C. A.,* should know the name of the person that they seek to influence and impede. Where defendants were charged with corruptly endeavoring to influence and impede a petit juror in a certain cause the evidence did not show that the juror sought to be influenced bore

the name alleged in the indictment. The contention was made that such failure in the evidence was fatal to the verdict and judgment. The Eighth Circuit Court of Appeals held otherwise stating,

> "Neither the instructions of the court, nor the quoted allegation from the indictment, made knowledge of the name of the juror an ingredient of the offense. Certainly, it was not material whether his name be Bert Gander, John Doe, or Richard Roe. The statute contains no such refinement. The use of the name of the juror was for purpose of identifying him. Appellants contend that proof that they knew his name was essential to their guilt. According to the evidence of the government, defendants knew that the man they were attempting to corrupt was a juror, and the alleged fact that 'the name Gander, the man Gander, either as a juror or as a person, is literally absent from the record,' as charged in appellants' brief, is quite aside from any question at issue."
>
> *Bedell v. United States,* 78 Fed. (2d) 359, 368;
> *Williamson v. United States,* 207 U. S. 425, *449.*

It matters not whether the Attorney General and United States Attorney for the Southern District of California and the judges, who at various times respectively sat in the Craig case, were named Jones or Smith, whether they were all of the same surname or all bore different names, they were the Federal officials who had charge and control of the Italo case and they as such officers were known to the courts and all persons else including the appellant here to be officers, made such by statutory law of the United States of America, and to be

the persons in charge and control of the Italo case, and those are the persons that the appellant and his co-conspirators conspired to influence as a means of endeavoring to impede and obstruct justice in that case.

Counsel rely on a case heretofore decided by this court and quote from that case an excerpt which appears on page 13 of appellant's brief. That quotation is the rule and is in harmony with the decisions on the point generally. In that case this court recognized the rule that if a statute that undertakes to create a crime is unconstitutional the court has no jurisdiction of such a proposed crime simply because there is no such crime known to the law. Thus the rule quoted in counsel's brief is in no wise different from the situation where no statute has created such a crime as that charged in an indictment under review. In that case there was no such crime as using a deadly weapon in resisting an Indian agent who was making a search for spirituous liquors on the reservation. No statute ever having made that act a crime, and that being the act which was charged in the indictment as a crime, this court necessarily held that since there was no such statutory crime as that described in the indictment the court had no jurisdiction of the subject matter, there being no subject matter in such an indictment.

Mackey v. Miller, 126 Fed. 161, 162, 163.

The appellant relies strongly upon *Pettibone v. United States,* 148 U. S. 197. In that case the court found that there could be no conspiracy to violate an injunction unless the conspirators were charged with and proven to

have known of the existence of the injunction; also that there could be no conspiracy to obstruct the administration of justice in a case unless it was alleged and proven that the conspirators had knowledge of the pendency of the case.

Appellant quotes at page 25 of his brief from that case as follows:

> "The official character that creates the offense and the scienter is necessary."

That quotation is slightly misleading. The court in the opinion had referred to *United States v. Kee,* 39 Fed. 603, and *United States v. Keen,* 5 Mason 453, both being cases of substantive offense of seeking to influence a witness or impede an officer and then said:

> "In cases of that sort it is the official character that creates an offense and the scienter is necessary."

That is not quite in harmony with the part of the statement quoted. In those cases the substantive offense was charged. In this case the conspiracy is the offense charged and the means to be used involved the official character of the parties conspired to be influenced but the influencing of those officials is not the crime here charged. It is alleged in the indictment to inform the defendant as to the particular conspiracy that he was called upon to defend against. That allegation in connection with the time alleged in the indictment of the existence of the conspiracy, the fact that the Italo case was pending and was in charge of officers of the United States government, identified with certainty the conspiracy charged against

the appellant and his co-defendants and served to protect him against prosecution for the same offense at a later time.

We submit that this court and the Supreme Court of the United States have passed upon all of the questions here presented and that the rulings have been adverse to all of the contentions of the appellant here, and submit that the order and ruling of the court below should be by this court affirmed and the petition of the appellant denied.

Respectfully submitted,

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No. ~~8395~~.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

4

In the Matter of the Application of

GAVIN W. CRAIG

For a Writ of Habeas Corpus.

GAVIN W. CRAIG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

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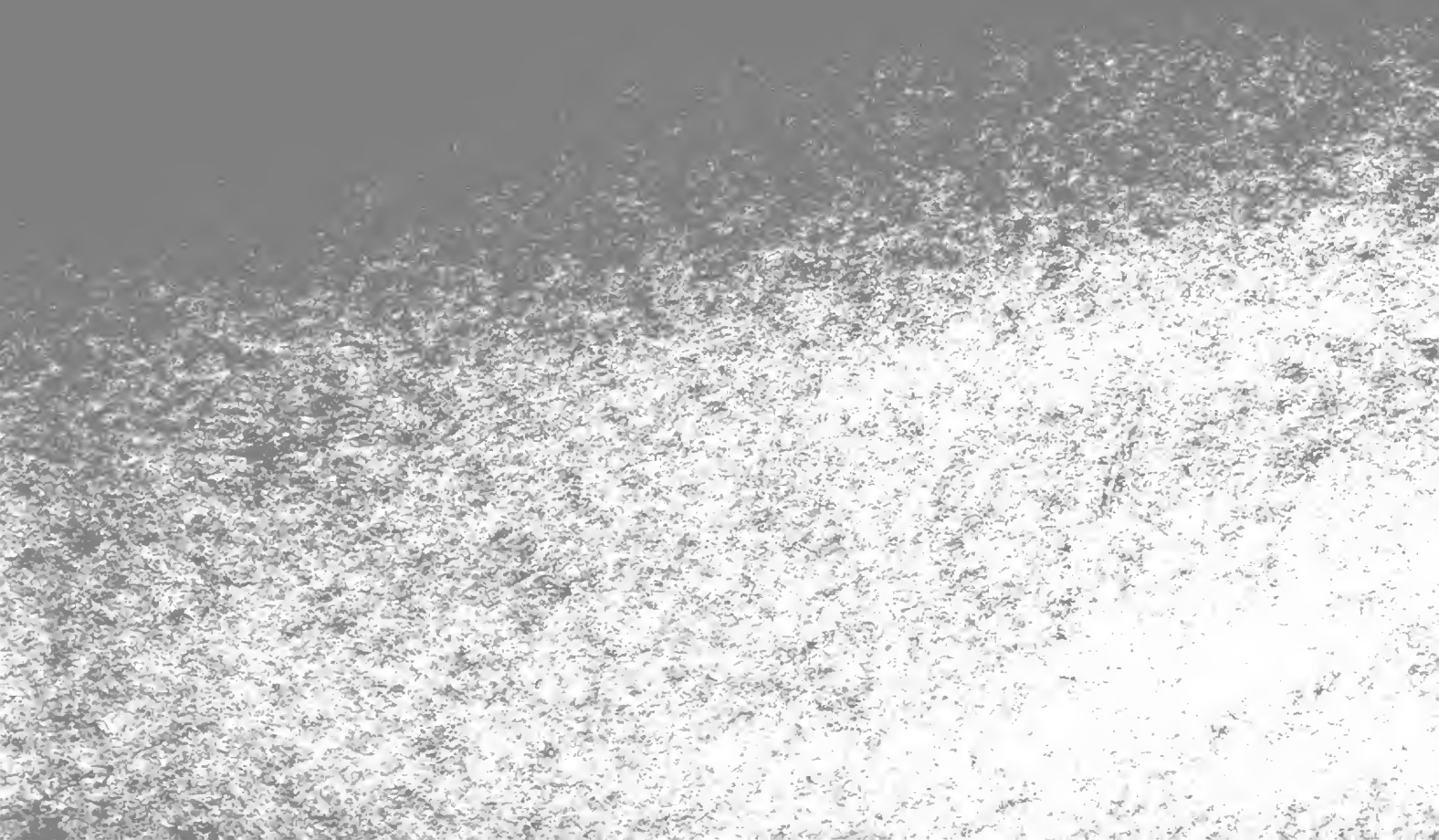

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In the Matter of the Application of

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GAVIN W. CRAIG,

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REPLY BRIEF OF APPELLANT.

An Answer to the Question Propounded by Judge Haney at the Oral Argument Before This Court Whether the Denial of Both Special and General Demurrers to the Indictment by the Trial Court and Its Affirmance on Appeal Did Not Determine the Issues Therein Involved.

It has been repeatedly held by Federal Courts as well as by courts of the various states that the general doctrine of *res judicata* is not applicable where a judgment is attacked upon the ground that the court rendering it lacked jurisdiction and that it was therefore void. That this is so finds proof in dozens of federal cases which have, upon application for habeas corpus, considered and de-

termined such issues adversely to their previous and *final* determination in other courts. Of course, the general doctrine of *res judicata,* that an issue once determined by a final judgment is conclusive as between the same parties so long as it remains unreversed, applies equally to a judgment which has become final through failure to appeal as to a judgment which has become final through affirmance on appeal or for any other reason. Yet no federal court has refused to consider and determine the question of the *validity* of a final judgment rendered by another court, where that question has been properly presented to it, regardless of the fact that, if the principle of *res judicata* were applicable, it would have been argued that that question had been once and for all determined by the judgment of the court rendering it.

The following cases involve the overturning of such a final judgment and the determination anew of the issue of the court's jurisdiction to render it: *White v. Levine,* 40 Fed. (2d) 502; *Waugh v. Aderhold,* 52 Fed. (2d) 702; *Ballarini v. Aderhold,* 44 Fed. (2d) 352; *Bertsch v. Snook,* 36 Fed. (2d) 155; *Colson v. Aderhold,* 5 Fed. Supp. 111; *Mackay v. Miller,* 126 Fed. 161; *Aderhold v. Schiltz,* 76 Fed. (2d) 429; *Sprague v. Aderhold,* 45 Fed. (2d) 790; *State of Missouri v. Title etc. Co.,* 72 Fed. (2d) 595.

In addition to the above cases where the judgment had become final through failure to appeal, in the following cases the issue of the court's jurisdiction had been determined not only by the trial court itself but had also been adjudicated by a higher court to which an appeal had been perfected and which had affirmed the judgment. But still, the question of jurisdiction was conceded to be

a proper one to be again presented to another court upon a petition for habeas corpus and to be decided adversely to its former determination if it was found, through a new and independent examination of the record, that the trial court lacked jurisdiction. Such cases are *Ex parte Royall* 117, U. S. 241 at 253; *Moore v. Dempsey,* 261 U. S. 86; *Ex parte Bridges, 2* Woods 428.

The above cited cases confirm, by inference at least, the rule expressly announced in other cases, to the effect that a judgment affirming a void judgment is itself void. These cases are discussed in Petitioner's Opening Brief at pages 15 *et seq.*

That the general principle of *res judicata* does not apply to the question of jurisdiction is again recognized in *Grubb v. Public Utilities,* 281 U. S. 469 at 475, where the court says:

> "The case in the state court was so far identical with the suit in the federal court as respects subject matter and parties that there can be no doubt that the judgment in the former, *unless invalidated by some jurisdictional infirmity,* operated to bar the further prosecution of the latter." (Italics ours.)

> "The doctrine of estoppel by judgment does not rest upon any superior authority of the court rendering the judgment * * * the adjudications which will operate as an estoppel may be rendered by a justice of the peace and other inferior courts." (34 C. J. 758.)

This being true, *res judicata,* if applicable at all to the issue of jurisdiction, would apply to judgments of state courts or federal district courts which have become final through failure to appeal as well as to judgments of the higher federal courts.

That petitioner's statement of the law, embodying a complete answer to this question and stated in his Opening Brief at page 9, is correct is conceded by the Government's Brief at page 3.

A second and distinct answer to Judge Haney's question is found in the fact that the principal grounds relied upon for the issuance of a writ of habeas corpus were not presented to either the trial court or the Circuit Court of Appeals by the special or general demurrers to the indictment. Nowhere in the demurrers, in the bill of exceptions, assignments of error, or in appellant's briefs was the proposition advanced that the indictment failed to confer jurisdiction upon the trial court because it lacked the essential ingredient of the office or the official capacities and functions of the persons to be influenced. It is well known that an appellate court considers only those arguments for reversal of a judgment which are specifically set forth in the assignment of errors and argued in the briefs. See:

Le Fanti v. United States, 259 Fed. 460;
May v. United States, 236 Fed. 495;
Kreuger v. United States, 254 Fed. 34;
Lee Tung v. United States, 7 Fed. (2d) 111, a 9th Circuit case.

Nor may it be said that the determination of the special or general demurrers became the "law of the case." In *Messinger v. Anderson,* 225 U. S. 436, 56 L. Ed. 1152, the court said:

> "Law of the case as applied to the effect of previous orders on the later action of the court rendering them *in the same case,* merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." (Italics ours.)

The Issues Presented In Petitioner's Opening Brief Relate Solely to the Question of Jurisdiction.

The first ground upon which we rely to secure the discharge of this petitioner is that the indictment sets forth no facts to charge one essential ingredient of the offense of conspiracy to obstruct or to endeavor to obstruct the due administration of justice; that consequently, this indictment is a nullity and could not and did not confer jurisdiction upon the trial court to try the case. We would emphasize that we rely upon the proposition that it is the settled law that the court had *no jurisdiction.* We believe that in our opening brief we have met this issue squarely. The authorities there quoted go to nothing less than that point. We have there shown that pleading an essential ingredient of an offense in generic words, with no facts whatever set forth, amounts to a failure to plead that ingredient; that where an essential ingredient is entirely omitted the indictment fails to charge any offense known to the law (pp. 28-32); that such an indictment is void, an utter "nullity," is "dead" (pp. 30-31), and leaves the court *"without jurisdiction* of the subject matter of the offense attempted to be charged." (p. 31.)

Neither in its brief nor in the argument before this Court has the Government even attempted to meet the authorities which we have cited which declare the law to be as above stated. Is it contended that even though a trial court had no jurisdiction over the subject matter of the offense attempted to be charged and hence no jurisdiction to pronounce judgment, the defendant cannot be discharged on habeas corpus? We are compelled to conclude that this is the Government's position. It has cited *In the Matter of Gregory,* 219 U. S. 210; *Knewel v. Egan,* 268 U. S. 442, and *Ex parte Ruef,* 150 Cal. 605.

It is expeditious to dispose of *Ex parte Ruef* by citing a few other California cases which establish beyond question that under the law of California where the information fails to state an essential ingredient of an offense attempted to be charged the petitioner will be discharged on habeas corpus. They are:

In the Matter of Roberts, 157 Cal. 472 (decided later than the *Ruef* case);

Ex parte Williams, 121 Cal. 328;

People v. Webber, 138 Cal. 149;

People v. Ammerman, 118 Cal. 23;

People v. Ward, 110 Cal. 369;

People v. Lee, 107 Cal. 477.

Analysis of In the Matter of Gregory.

From *In re Gregory, supra,* the reply brief quotes these excerpts: "the only question before us is whether the Police Court had jurisdiction"; "A habeas corpus proceeding cannot be made to perform the function of a writ of error"; and "we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment." Our authorities do not conflict with these statements. The legal issues which we present were not involved in that case. There the information contained a statement of facts. It was stipulated to be a part of the information. The instant indictment contains *no averment of facts* concerning an essential element of the offense attempted to be charged,—

not one fact. *Keck v. United States,* 172 U. S. 434; *Hess v. United States,* 153 U. S. 587; and *United States v. Robinson,* 266 Fed. 240, all hold that where, as here, no facts are alleged, but only legal conclusions in the form of generic language, *there are no issues to present to a jury.*

Where, as in the Gregory indictment, facts are averred, the trial court has the undoubted right to "apply the law" and if it errs it is merely error and not want of jurisdiction. The court was "not concerned with whether the acts set forth in the agreed statement constituted a crime" because *acts* were set forth. And when the court said "we are not concerned with whether the information was sufficient" it of course had reference to the information before it which contained a statement of facts. It has no reference to an indictment which shows on its face that it does not state an offense known to the law and which violates two of the most prized constitutional rights of the accused.

Again, the Gregory opinion quotes with approval *Ex parte Parks,* 93 U. S. 18, to the effect that the trial court must pass on the question whether or not the "act" charged is a crime, and that it has jurisdiction to do this. But in the instant indictment no "act" respecting an essential ingredient of the attempted charge is set forth. We venture the assertion that no decision of the United States Supreme Court can be found which has said that the trial court had jurisdiction to pass on the question of whether the indictment stated an offense, where it wholly omitted an essential ingredient of the offense by pleading it in generic language only.

However, the *Gregory* case is authority that in a habeas corpus proceeding the indictment may be so deficient that the Appellate Court must say that it did not confer jurisdiction on the trial court. The court assumes that from the agreed statement of facts, stipulated to be a part of the information, it might appear that there was a total want of criminality and that in that case the trial court would be without jurisdiction to pass on other matters. Such is the case here.

It will be seen that there is a clear line of demarcation between the two lines of cases when both are carefully examined. Of the cases which seem to say that the trial court, if of competent jurisdiction, has power to pass finally upon its own jurisdiction, if it has general jurisdiction of the class of cases involved, and in the exercise of that jurisdiction to decide whether an indictment states any offense known to the law, so that the correctness of its decision cannot be inquired into on habeas corpus, not one involved an indictment which alleged *no* facts upon an essential ingredient.

In each case, it appears from the opinion that "acts" or "facts" are alleged, upon which the trial court had jurisdiction to apply the law.

In each of the decisions where it was held that a petitioner on habeas corpus is entitled to his discharge where the indictment lacks an essential ingredient of the offense attempted to be charged, no mention is made of such essential ingredient, or it is set forth only in terms of generic language.

Analysis of Knewel v. Egan.

Let us now discuss the case principally relied upon by the Government in its argument before this Court, *Knewel v. Egan, supra.* There are several reasons why it does not apply to the issue herein raised that the instant indictment is void and that it conferred no jurisdiction upon the District Court, for any purpose.

Firstly, it is one which arose in a state court. The opinion itself makes it clear that the question concerning the sufficiency of the indictment is viewed from that standpoint and attention is called to the fact that each of the cases cited arose in the state courts; that in each the Supreme Court has stressed that in such cases, not because of lack of jurisdiction, but as a rule of practice, a Federal court should not by habeas corpus declare the judgments of the highest courts of states to be nullities, when such courts have held that the trial courts had jurisdiction. Space will not permit quoting from but two such decisions. They are *Baker v. Grice,* 169 U. S. 748, and *Howard v. Fleming,* 191 U. S. 126.

The *Baker* case was an appeal from an order of the United States Circuit Court discharging petitioner on habeas corpus after his conviction in the state courts of Texas. In reversing the Circuit Court the Supreme Court of the United States said that while the lower court had jurisdiction under the circumstances set forth (petitioner claimed that the state statute under which he had been convicted was unconstitutional) to issue the writ of habeas corpus, yet those courts ought not to exercise that jurisdiction unless in cases of peculiar urgency and that instead they will leave the prisoner to be dealt with by the courts of the state; that after a final determination

of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by a writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom, and thus a trial in the state courts and by an indictment found under the laws of a state be finally prevented. After stating that cases justifying such interference are exceptional, the opinion continues:

> "Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court."

In *Howard v. Fleming* the court says: "We premise that the trial was had in a state court and therefore our range of inquiry is not so broad as it would be if it had been in one of the courts of the United States." The court then holds that no Federal question was presented as concerned the indictment and that, as to the question of due process, the petitioner had failed to take the necessary steps to preserve that question.

Secondly, the *Knewel v. Egan* case is distinguishable from the instant case in that there the indictment, as in *In the Matter of Gregory,* set forth some facts upon which the trial court had authority to pass and to decide the question whether those facts described a public offense. It is elementary that an opinion is to be understood as intended to be limited in its scope by the issues upon which it is

passing. What is said about habeas corpus not being used to review the sufficiency of an indictment must refer to such an indictment as the one then presented to it.

That this is true is emphasized by the fact that in each of the decisions which it cites in support of its statement the opinion clearly indicates that the respective indictments considered set forth facts upon which the trial courts could apply the law, or in some instances where what was said was by way of analogy only (an indictment not being involved), that the kind of indictment it was discussing contained an allegation of facts.

We close our discussion on the *Knewel* case by quoting from one more case which it cites, *Markuson v. Boucher,* 175 U. S. 124, which says:

> "We have frequently pronounced against the review by habeas corpus of the judgments of the state courts in criminal cases, because some right under the Constitution of the United States was alleged to have been denied the convicted person, and have repeatedly decided that the proper remedy was by writ of error."

However, *in cases originating in the United States District Court* the rule has never been questioned to be as stated in petitioner's opening brief, page 36: "One who is deprived of his liberty under a judgment which denies him a constitutional right is entitled to be discharged by habeas corpus." The cases there stated and many others declare this to be the law. We are certain that none can be found holding counter to them and the Government has cited none.

Government's Brief Fails to Meet the Issues Presented by Petitioner.

The Government's brief comes very near to being a confession that the indictment under which petitioner has been convicted and incarcerated sets forth no facts to constitute a public offense, or, as *Hess v. U. S.,* 153 U. S. 587, puts it, that the indictment presents no issues which could be submitted to a jury. Nowhere in the Government's brief is any attempt made to assert that the indictment sets forth any *facts* to charge a conspiracy to obstruct justice. It contends that less is required in charging conspiracy to endeavor to obstruct justice than is required in charging conspiracy to endeavor to influence, etc., any officer, etc., in the discharge of his duties. When it is remembered that this argument is intended as an answer to the contention in petitioner's opening brief that the indictment fails to charge any offense whatever and directs its attack equally upon both charges, the unmistakable import of the Government's brief as it deals with this phase of the issue is to concede that the indictment, having entirely omitted an essential ingredient of the offense attempted to be charged, is a nullity.

Nor would a contention that less particularity is required in the charge of a conspiracy to endeavor to obstruct justice than in the charge of conspiracy to obstruct justice be of any avail. We believe the law to be that so far as charging conspiracy to endeavor to obstruct justice is concerned even greater particularity is demanded than in charging conspiracy to obstruct the due administration of justice. The rule and the reasons for it are well stated in *United States v. Ford,* 34 Fed. 26. The charge was that the defendant "did forcibly *attempt* to rescue" prop-

erty seized by a revenue collector. Although conceding that the evidence fully warranted conviction it was held that the motion in arrest should have been granted because the indictment failed to set forth facts as to the attempt. It is said:

> "An attempt to commit a crime is an incomplete effort made by some act intermediate to a criminal intention and a consummated crime. The intention of the actor can alone be clearly ascertained by the movements which he has made to complete his design. The acts and words of a wrong-doer are therefore essential ingredients to constitute an offense, and show the purpose he had in view."

Throughout the Government's brief from pages 8 to 16, inclusive, it is assumed that petitioner has contended that for the indictment to be valid it must name the officers whom it charges the accused conspired to influence. Our opening brief contains no such futile assertion. We believe the law to be as stated in *Kellerman v. United States,* 295 Fed. 796, that "the office or the official function" of the one whom the conspirators agreed to influence, "as a person within the class described in the statute, are facts which must be alleged in the indictment," without which it is fatally defective. We insist that the law is settled as stated in the authorities named in the opening brief (pp. 21-23), and especially as declared in *Milner v. United States,* 36 Fed. 890, that in charging the offense of *conspiracy to obstruct the due administration of justice* the person conspired to be influenced must be identified or particularized and his official function or official capacity is an essential ingredient of the offense, without which no offense can be charged.

The Government's brief suggests that the Court would take judicial notice of who the Attorney General and his assistants are. Apparently the purpose of the indictment is misconceived. We need not say that it is primarily to inform the defendant of the nature of the charge (the asserted facts constituting each essential element) and to protect him against double jeopardy.

But in arguing this issue the Government further assumes a fact which makes his argument misleading, to-wit, that the indictment in effect charged that the defendants conspired to influence "whatever Attorney General or assistant United States Attorney might be assigned to the particular case at any time." The language of the indictment does not warrant this construction. This language is set forth on page 18 of our opening brief. Nor does it warrant the construction attempted to be placed upon it that the charge was really that the conspirators agreed to influence "whatever person at any time during the life of the conspiracy had charge or control of the Italo case." If that had been intended by the pleader he might have and could have easily worded the charge so that it would say just that. The court's attention is again attracted to the *Milner v. United States* case, *supra,* where the charge was phrased in identically the same way as here; the accused were charged with having conspired to influence "*the* officers of the United States acting under the authority of the United States, for the Northern District of Alabama, and before whom said suits were pending," and it was held to be fatally defective

in not particularizing the official capacity or official function of the persons to be influenced or to identify such persons. Even if the language in the instant indictment were construed as suggested by the Government it would be just as deficient as though construed as it plainly reads, because under the *Milner, Kellerman* and other cases which we have cited, including the Cruickshank decision the official function or the official capacity of such person must be named. The authorities cited in our opening brief have never been overruled or qualified and they foreclose the strained argument which is presented in the Government's brief.

Apparent Conflict in Supreme Court Decisions Explained.

Before closing, petitioner desires to call this Court's attention to an apparent conflict in the decisions of the United States Supreme Court upon the issue of whether the sufficiency of an indictment to state any offense whatever may be properly raised upon a petition for a writ of habeas corpus.

Certain early cases commencing with *Ex parte Watkins,* 3 Peters 193, and including *Ex parte Parks,* 93 U. S. 18, and *Ex parte Yarborough,* 110 U. S. 651, held that its sufficiency in this respect could not be questioned on habeas corpus. The logic of the *Watkins* case seems sound for the opinion is founded upon the theory that the court could not do indirectly what it had no power to do directly. That this is the basis of the decision is shown by the following quotation:

> "This application is made to a court which has no jurisdiction in criminal cases, which could not revise this judgment; could not reverse or affirm it, were the record brought up directly by writ or error."

By in *Ex parte Coy,* 127 U. S. 731, the Supreme Court in no uncertain terms expressly overruled what it had declared in the *Watkins, Parks* and *Yarborough* cases. It says:

> "In the Watkins decision it certainly was not intended to say that because a Federal court tries a prisoner for an ordinary common law offense with no averment or proof of any offense against the United States or any connection with a statute of the United States, that he cannot be released by habeas corpus because the Court has assumed jurisdiction."

This disavowal of the almost unthinkable doctrine of the *Watkins* case is emphasized by the dissenting opinion of Justice Field. Of course, the reason expressly stated in the Watkins opinion for its decision is no longer present for the Supreme Court now may assume jurisdiction in criminal cases and reverse such judgments. Since the Coy opinion was written we venture to say that there is no decision of any Federal Court which has disputed that habeas corpus is a proper remedy where the indictment avers no facts whatever that constitute an offense against the United States; and further that no decision has denied that where such facts are pleaded in generic language only the indictment is void.

We submit that the instant indictment failed to charge any offense against the United States because an essential ingredient of the offense sought to be charged was omitted; that it was therefore void and failed to confer jurisdiction upon the trial court of the subject matter; and that lack of jurisdiction of the court rendering a judgment is a proper issue for presentation upon a petition for a writ of habeas corpus; also that the judgment of conviction was void because petitioner had been previously acquitted of the identical offense charged; and submit that the order and ruling of the court below should be by this Court reversed and the petition of appellant granted.

Respectfully submitted,

JOHN P. BEALE,
E. T. MCGANN,
GAVIN MORSE CRAIG,
Attorneys for Appellant.

GAVIN W. CRAIG,
In Propria Personam.

No. 8397

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Company,

Appellants,

vs.

THE PACIFIC TELEPHONE and TELEGRAPH COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco

No. 8397

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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JAMES M. NAYLOR, Esq.,
ARTHUR B. SHAPRO, Esq.,
Russ Bldg., San Francisco, Calif.,
Attorneys for Appellants.

PILLSBURY, MADISON & SUTRO, Esqrs.,
Standard Oil Bldg., San Francisco, Calif.,
Attorneys for Appellee.

[Endorsed]: Filed Oct 26 1935.

Issued Subpoenas

PILLSBURY, MADISON & SUTRO,
Attorneys for Plaintiff,
Standard Oil Building,
San Francisco, California.

In the District Court of the United States for the Northern District of California, Southern Division.

In Equity—No. 3943S

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Plaintiff,

vs.

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co.,
Defendants.

BILL OF COMPLAINT

To the Honorable Judges of the United States District Court for the Northern District of California, Southern Division:

Plaintiff complains of defendants and for causes of action alleges: [1*]

I.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California and has its principal place of business in the City and County of San Francisco, State of California, in the Northern District of California and in the Southern Division thereof.

II.

Defendants are citizens of the United States and inhabitants of the City of Oakland, County of Alameda, State of California, in said Northern District of California and in the Southern Division thereof.

III.

This suit arises under the Copyright Acts of the United States.

IV.

Plaintiff, since its incorporation in 1906, has been engaged in the business of furnishing telephone and telegraph service in and throughout the City and County of San Francisco, and the Counties of Alameda, Contra Costa, Marin and San Mateo, State

*Page numbering appearing at the foot of page of original certified Transcript of Record.

of California, and generally throughout said Northern District of California. In furnishing such telephone and telegraph service it has been for many years, and now is, subject to the Constitution and laws of the State of California and under the provision of said Constitution and laws, it is a public utility. As a part of furnishing said telephone service as a public utility to the inhabitants of said city and county, and counties, it has published and caused to be printed, at frequent intervals, the San Francisco and Bay Counties Telephone Directory and the Oakland, Alameda, Berkeley, San Leandro and Bay Counties Telephone Directory, which directories contain the names, [2] addresses and telephone numbers of each listed subscriber to telephone service of the plaintiff in said localities on the date when the manuscript for said directories closes. Issues of these directories are published by plaintiff at various intervals. These issues are necessary by reason of the numerous changes of residence and business addresses and telephone numbers, as well as the addition of new subscribers, and the discontinuance of telephone service by other subscribers. The cost of publishing said telephone directories for the May, 1935, editions thereof, was the sum of $295,222.

V.

The work of collecting and arranging the names, addresses and telephone numbers of its various subscribers, and of keeping the same corrected to date,

as published in its directories, involves a large amount of detail and requires great effort, discretion, care, skill, labor and accuracy. At varying intervals the material collected and arranged is published and constitutes and is the only authorized and correct telephone directory of the subscribers in the hereinabove mentioned counties and in the immediate vicinity, and plaintiff as author, owner, compiler and publisher thereof, and by reason of its financial interest in the classified section of said directories, which contains a large amount of advertising, which is bound and published with the alphabetical portions thereof, is possessed of a valuable business and goodwill in the entire directories.

VI.

Plaintiff, on April 29, 1935, published the May 1935 issue of the Oakland, Alameda, Berkeley, San Leandro and Bay Counties telephone directory and the May 1935 issue of the San [3] Francisco and Bay Counties telephone directory. Plaintiff, as author and proprietor of said directories, duly copyrighted them under the copyright laws of the United States by doing the following acts:

1. It caused the text of all copies to be printed from plates made within the limits of the United States from type set therein, and it caused the printing of the text and the binding of the said books to be performed within the United States.

2. After the printing, typesetting and manufacture of said directories, as herein alleged, plaintiff

published said directories within the limits of the United States, which was the first publication thereof in this or any other country with the notice of copyright required by the statutes of the United States then in force, by affixing to each and every copy of said books published or offered for sale in the United States upon the title page thereof, the word "Copyright" together with the year in which the copyright was secured by publication, accompanied by the name of plaintiff as the copyright proprietor, in the manner following: "Copyright 1935, by The Pacific Telephone and Telegraph Company."

3. After plaintiff had secured the copyright of said directories by publication of the said directories with the notice of copyright, as hereinabove alleged, plaintiff promptly deposited in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, which copies were produced in accordance with the manufacturing provisions hereinabove set forth.

VII.

The copies of said directories so mailed, addressed to [4] the Register of Copyrights, Washington, District of Columbia, were accompanied by affidavits under the official seal of an officer authorized to administer oaths within the United States, duly made by a duly authorized agent of plaintiff, residing in the United States, setting forth therein that plain-

tiff had duly done and performed all acts and complied with all requirements necessary to establish its rights to the aforesaid copyrights under the statutes of the United States in such cases made and provided, and had paid the fees required by the Copyright Act.

VIII.

After the mailing of said copies and affidavits, as aforesaid, the Register of Copyrights issued to plaintiff certificates of copyright of said issues of said directories pursuant to the copyright laws, photostatic copies of which certificates are attached hereto, marked Exhibits "A" and "B", and made a part hereof as fully as if herein set forth at length.

IX.

Commencing with the issue of October 1908 and continuously thereafter to and including said May 1935 issue of said directories, it has duly and legally copyrighted each of said directories.

X.

The collection, editing, compilation, classification, arrangement and preparation of the material included in said directories required discretion, judgment, painstaking care, skill and experience of a high order. The result of the labor of the persons employed and paid by plaintiff for those purposes before publication became and was the sole and exclusive property of plaintiff, who possessed the sole and exclusive literary and other rights therein, in-

cluding the right to [5] copyright. The said directories, and each of them, constitute and are, within the meaning of the Copyright Act, new and original literary works, and are the proper subject of copyright. Said copyrights are all unexpired and are still in full force and effect, and plaintiff is the sole and exclusive owner, author and proprietor thereof.

XI.

After the securing of the several copyrights in said directories and the registration of the same, and particularly after the distribution of the May 1935 issue of the said directories, and before the commencement of this suit, the defendants, with full knowledge of the aforesaid copyrights of plaintiff and during the existence thereof, and while the same were in full force and effect, and during the period of ownership thereof by plaintiff, have knowingly, wrongfully, wilfully, fraudulently and unlawfully caused to be prepared and printed, published and distributed, certain alleged telephone directories entitled "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935." Defendants have copied and transferred into their said directories, without the consent or license of plaintiff and in violation of plaintiff's rights under its copyrights, valuable and material portions of plaintiff's copyrighted books. Said piratical books of defendants are largely, and to an injurious extent, copies from plaintiff's aforesaid copyrighted books with substantially no change. The copying by defendants

from plaintiff's books is so exact as to include any errors or mistakes contained in plaintiff's copyrighted books, and thus defendants have saved themselves the expenditure of a large amount of time, labor and money. The portions of plaintiff's copyrighted books so taken and appropriated constitute and are the substantial [6] and material portions thereof and of said defendants' infringing books. The list of subscribers contained in defendants' said infringing books is entirely copied from plaintiff's said copyrighted books, and plaintiff is informed and believes, and therefore avers, that said lists were not obtained from original sources.

XII.

The purpose of defendants in producing their said infringing telephone directories, by copying and appropriating therefor the material contained in plaintiff's said copyrighted telephone books, instead of obtaining the same from original sources, was to sell advertising space in said infringing books, and not for the purpose of benefiting plaintiff's subscribers. Such infringing books, containing errors which have been corrected in later issues of plaintiff's directories, tend to and do impede and hamper the telephone using public by reason of the fact that the users of said infringing books will call numbers which have been discontinued or changed, all to the expense and detriment of plaintiff and the telephone using public.

XIII.

Plaintiff has been informed by defendants that they are now at work in preparing additional infringing telephone books and more particularly one for the City and County of San Francisco, State of California, and are soliciting advertising subscriptions therefor, the lists of subscribers for which are being taken from plaintiff's copyrighted telephone directories.

XIV.

The deliberate and premeditated copying and piracy by defendants, in appropriating plaintiff's copyrighted [7] material for use in palming off on its subscribers inaccurate telephone directories, for the purpose of selling advertising, constitutes an unconscionable and inexcusable fraud upon the telephone using public, and has resulted in manifold wrong and irreparable damage and injury to plaintiff, and will continue to do so.

XV.

Copies of plaintiff's said copyrighted books and a copy of said defendant's infringing books are filed herewith.

XVI.

Defendants have been duly, specifically and directly notified of their infringement of said copyrighted books, but nevertheless, plaintiff is informed and believes and therefore avers, have continued to infringe, and are now threatening to continue to infringe, said copyrights, to the great and irreparable loss, damage and injury of plaintiff.

XVII.

Plaintiff has no adequate remedy at law, and its only remedy is in this Court sitting as a Court of Equity.

Wherefore, by reason of the premises, and in conformity with the statutes of the United States, plaintiff prays that:

1. The defendants, and each of them, as a firm, and as individuals, as well as their associates, servants, employees, attorneys and assigns, and each and all of them, may be enjoined and restrained by a temporary restraining order and by injunction, preliminary until final hearing, and perpetual thereafter, from directly or indirectly printing, publishing, disposing of or causing or permitting the printing, publication, sale, delivery or disposition of the aforesaid books entitled as above, or any [8] other telephone or other book of any class or description copied in whole or in part from plaintiff's copyrighted telephone directories and each, all and every part and portion thereof.

2. The defendants, and each of them, be decreed to pay plaintiff such damages as plaintiff may have suffered due to the infringement of plaintiff's copyrights, as well as all profits which defendants may have realized from such infringement.

3. The defendants, and each of them, pay to plaintiff one dollar for each copy of defendants' books infringing plaintiff's copyrighted books made, disposed of, or found in the possession of defendants, or their associates, agents or employees, or anyone in their behalf.

4. The defendants, and each of them, be required to render a full and complete accounting for profits and such damages as are provided by law.

5. The defendants, and each of them, be required to deliver up, to be impounded during the pendency of this action, upon such terms and conditions as to the court may seem just and equitable, all such infringing books.

6. The defendants, and each of them, be required to deliver up for destruction all of such infringing copies, as well as all plates, molds, matrices, or other means of making such infringing copies.

7. The defendants, and each of them, be required to pay the full cost of this proceeding, including reasonable attorneys' fees to be taxed as costs.

8. The defendants, and each of them, be required to answer this bill of complaint.

9. This court issue a temporary restraining order [9] and then a preliminary and permanent injunction enjoining and restraining the said defendants, and each of them, and their associates, agents, attorneys, employees and assigns, and any other person acting for them, directly or indirectly, in the manner and form aforesaid, and for a writ directed to the Marshal of this District, commanding the said marshal to seize said infringing articles, upon the posting herein by plaintiff of an undertaking in the manner and form and in the amount to be fixed by this court, and for a writ of subpoena to issue out of this court and under the seal thereof, directed to the said defendants, and each of them,

commanding them to be and appear before this Honorable Court on a day certain therein named.

PILLSBURY, MADISON & SUTRO
Solicitors for Plaintiff. [10]

State of California,
City and County of San Francisco—ss.

W. G. KLEINSCHMIDT, being first duly sworn, deposes and says: That he is an officer, to wit, the Secretary, of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, the plaintiff in the above entitled suit, and as such makes this affidavit for and on behalf of said corporation; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

W. G. KLEINSCHMIDT

Subscribed and sworn to before me this 15th day of October, 1935.

[Notarial Seal] FRANK L. OWEN
Notary Public in and for the City and County of San Francisco, State of California. [11]

EXHIBIT "A"

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
San Francisco, Calif.

Title of book: Telephone Directory San Francisco California and Bay Counties. May 1935.

By The Pacific Telephone and Telegraph Company, of the United States.

Date of publication Apr. 29, 1935.
Affidavit received May 11, 1935.
Copies received May 13, 1935.
Entry: Class AA, No. 173843.
[Seal] WM. L. BROWN
Register of Copyrights.
U. S. Government Printing Office: 1931

AA

LIBRARY OF CONGRESS
COPYRIGHT OFFICE OF THE
UNITED STATES OF AMERICA
WASHINGTON

CERTIFICATE OF COPYRIGHT REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that TWO copies of the BOOK named herein have been deposited in this Office under the provisions of the

Act of 1909, together with the AFFIDAVIT prescribed in section 16 thereof; and that registration of a claim to copyright for the first term of 28 years from the date of publication of said book has been duly made in the name of

(over) [12]

EXHIBIT "B"

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

San Francisco, Calif.

Title of book: Telephone Directory, Oakland California, Alameda, Berkeley, San Leandro and Bay Counties. May 1935.

By the Pacific Telephone and Telegraph Company of the United States.

Date of publication Apr. 29, 1935.
Affidavit received May, 1935.
Copies received May 13, 1935.
Entry: Class AA, No. 173844.
[Seal] WM. L. BROWN
Register of Copyrights
U. S. Government Printing Office: 1931

AA

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(over) [13]

[Endorsed]: Filed Nov 15 1935.

[Title of Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified bill of complaint herein filed on the 26th day of October, 1935, and the return of subpoena herein served on the defendants herein on the 13th and 15th day of November, [14] 1935, and upon motion of the plaintiff by its counsel, Messrs. Pillsbury, Madison & Sutro,

It is ORDERED, ADJUDGED and DECREED that the defendants, and each of them, herein show cause if any they, or either of them, have, before the District Court of the United States for the Northern District of California, Southern Division, in the Post Office Building in the City and County of San Francisco, Room 332 thereof, on the 25th day of November, 1935, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue pendente lite as prayed for in the bill of complaint herein enjoining the defendants, and each of them, as a firm and as individuals, as well as their associates, servants, employees, attorneys and assigns, and each and all of them, from directly or indirectly printing, publishing, disposing of or causing or permitting the printing, publication, sale, delivery or disposition of alleged telephone directories entitled "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935," or any other telephone or other book, of any class or description copied in whole or in part from plaintiff's copyrighted telephone directories and each, all and every part and portion thereof and that defendants, and each of them, at said time and place also show cause why plaintiff should not have such other and further relief in the premises as may be just and proper.

It is further ORDERED, ADJUDGED and DECREED that sufficient cause having been shown, service of this order may be made on the defend-

ants, and each of them, on or before the 19th day of November, 1935, which shall be sufficient [15] service.

Dated: Nov. 15, 1935.

A. F. ST. SURE
United States District Judge

[16]

[Endorsed]: Filed Nov 21 1935.

[Title of Court and Cause.]

AFFIDAVIT OF A. C. CALENDER

State of California,
City and County of San Francisco—ss.

A. C. CALENDER, being first duly sworn, deposes and says: That he is a District Commercial Manager of The Pacific Telephone and Telegraph Company, plaintiff above named. On July 24, 1935, at defendants' house at 3578 California Street, on August 19, 1935, in affiant's office, and on September 10, 1935, in the office of [17] Samuel L. Wright, Esq., of Messrs. Pillsbury, Madison & Sutro, solicitors for the plaintiff in the above entitled cause, defendant, Fred S. Leon, informed affiant that defendants had copied all of the names and telephone numbers in defendants' East Bay numerical telephone directory entitled "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935," from the May, 1935, issue of plaintiff's Oakland, Alameda, Berkeley, San Leandro

and Bay Counties Telephone Directory; and further affiant sayeth not.

A. C. CALENDER

Subscribed and sworn to before me this 21st day of November, 1935.

[Seal] W. W. HEALEY

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires August 29, 1937. [18]

[Endorsed]: Filed Nov 21 1935.

[Title of Court and Cause.]

AFFIDAVIT OF P. R. CLEMENTS

State of California,
City and County of San Francisco—ss.

P. R. CLEMENTS, being first duly sworn, deposes and says: That he is an employee of The Pacific Telephone and Telegraph Company. He purchased a copy of defendants' San Francisco and other counties and towns numerical telephone directory entitled "San Francisco and [19] Other Counties and Towns Numerical Telephone Directory" on November 14, 1935, which is the first day, he is advised, said directories were placed on sale to the public, from the defendant, Dagmar Leon, at the defendants' office, Room No. 781, Monadnock Building, San Francisco, for $10.30.

Affiant has made a check of all known errors in plaintiff's May, 1935, issue of its San Francisco and

Bay Counties Telephone Directory, and each one of these errors, whether in the name of the subscriber or telephone number, appears in defendants' "San Francisco and Other Counties and Towns Numerical Telephone Directory."

Affiant is advised that eight listings, that is, the names, telephone numbers and addresses of subscribers of plaintiff, have been omitted from plaintiff's May, 1935, issue of its San Francisco and Bay Counties Telephone Directory. None of these listings appear in defendants' "San Francisco and Other Counties and Towns Numerical Telephone Directory." Fifteen listings appear in said issue of plaintiff's said directory which were obsolete, that is, the subscribers should no longer have the listings as they appear in said issue of plaintiff's said directory. All of these fifteen listings appear in defendants' said numerical directory.

Affiant is advised that over 4,000 of plaintiff's subscribers in San Francisco have nonpublished listings which do not appear in plaintiff's telephone directories. Affiant selected at random twenty-eight of these nonpubished listings and none of them appear in defendants' said numerical directory.

Since the publication of the May, 1935, issue of plaintiff's San Francisco and Bay Counties Telephone Directories, plaintiff has received several hundred new subscribers. Affiant picked at random twenty-five names of these new customers and no one of their names or [20] listings appear in defendants' said numerical directory; and further affiant sayeth not.

P. R. CLEMENTS

Subscribed and sworn to before me, this 21 day of November, 1935.

[Notarial Seal] W. W. HEALEY

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires August 29, 1937. [21]

[Endorsed]: Filed Nov 25 1935.

Receipt of a copy of the within Affidavit is hereby admitted this 25 day of Nov. 1935.

JAS. M. NAYLOR

Attorney for Dfts.

[Title of Court and Cause.]

AFFIDAVIT OF P. R. CLEMENTS

State of California,
City and County of San Francisco—ss.

P. R. CLEMENTS, being first duly sworn, deposes and says: That he is an employee of The Pacific Telephone and Telegraph Company; Attached hereto and marked Exhibit "A" is a list which shows the [22] errors, omissions and obsolete listings which appear in both plaintiff's May, 1935, issue of its Oakland, Alameda, Berkeley, San Leandro and Bay Counties Telephone Directory, and in defendants' Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935.

Attached hereto and marked Exhibit "B" is a list of the errors, omissions and obsolete listings which appear in both plaintiff's May, 1935, issue

of its San Francisco and Bay Counties Telephone Directory, and in defendants' San Francisco and Other Cities and Towns Numerical Telephone Directory, 1935-1936.

The third column of each said exhibit shows the listings in their correct form as they should have appeared in plaintiff's said directories and the listings which should not appear in plaintiff's said directories; and further affiant sayeth not.

P. R. CLEMENTS

Subscribed and sworn to before me this 25th day of November, 1935.

[Notarial Seal] FRANK L. OWEN

Notary Public in and for the City and County of San Francisco, State of California. [23]

EXHIBIT "A"

Check of East Bay Alphabetical Listing Errors and Omissions of May 1935 Bay Counties Directory against Numerical Telephone Directory—Oakland, Berkeley, Alameda, San Leandro, 1935

East Bay Alphabetical Errors May 1935 Bay Counties Directory		East Bay Alphabetical Errors 1935 Numerical Telephone Directory		Correct Listing Should Read	
Benjamin J K	ME rritt 2984	Same		(Should not appear)	
Browne F R	FR uitvale 7512-W	"		(Should not appear)	
Cliff J D	PI edmont 6333-W	"		*Clift* J D	PI edmont 6333-W
Conlon M T Lt	HI ghgate 3345	Conlon M T	HI ghgate 3345	Conlon M *J* Lt	HI ghgate 3345
Egstrom O G	FR uitvale 7675-J	Same		*Engstrom* O G	FR uitvale 7675-J
(Fraser J P	AN dover 4006)Omitted	"		Fraser J P	AN dover 4006
Gift May W	GL encourt 6635	"		Gift May W	GL encourt *6655*
(Greenlaw C Merrill	OL ympic 0234)Omitted	"		Greenlaw C Merrill	OL ympic 0234
Hall Jeannette Mrs	BE rkeley 3208	Hall J Mrs	BE rkeley 3208-W	Hall Jeannette Mrs	BE rkeley 3208-*R*
Haller Paul H	OL ympic 3258	Same		Haller Paul H	OL ympic *3680*
Hoffman Harry G	AN dover 6422	"		(Should not appear)	
Jones C W Mrs	OL ympic 5024	"		Jones C W Mrs	*HU mboldt 5239*
Kaufman L E	OL ympic 8086	"		Kaufman L E	OL ympic *8886*
Kiosterud Roland	AN dover 1938	"		Kiosterud Roland	AN dover *1538*
McKay's Automotive Repair	GL encourt 0373	"		*McKay* Automotive Repair	GL encourt 0373
McKenna Marian	HI ghgate 1689	"		McKenna *Marion*	HI ghgate 1689
Monohan H	HU mboldt 2185	"		Monohan H	*OL ympic 8088*
(National Shirt Shops Inc	HO lliday 5706) Omitted	"		National Shirt Shops Inc	HO lliday 5706
O'Brien Alice W Miss	FR uitvale 2607-J	"		O'Brien Alice W Miss	FR uitvale *3452-M*
Parsons F C Mrs School St Pharmacy	FR uitvale 5620	Parsons F C Mrs.	FR uitvale 5620	(Should not appear)	
Reed H Arthur Mrs.	AL ameda 4738-W	Same		Reed H Arthur	AL ameda *4738-M*
Perrin O J	HI ghgate 9746	"		(Should not appear)	
Robertson Earl	FR uitvale 4851-J	"		(Should not appear)	
Ross Frank Mrs.	TE mplebar 0944	Rose Frank Mrs.	TE mplebar 0944	(Should not appear)	
Sacramento Ostrich Feather Works	HO lliday 3776	Same		(Should not appear)	
Smith Charles J	SW eetwood 1889	Smith Charles	SW eetwood 1889		Sweetwood 1889
Snyder H O	FR uitvale 2972-J	Same		Snyder H O	FR uitvale *2976-J*
Sommarstrom Edw	TE mplebar 1548	"		(Should not appear)	
Stanley Refrigerator Co	TE mplebar 2549	Stanley Ref Co	TE mplebar 2549	Stanley Refrigerator *& Fixture Co.*	TE mplebar 2549
Sutherland Evelyn Mrs	OL ympic 0767	Same		Sutherland Evelyn Mrs	OL ympic *0761*
Thompson Donald F	ME rritt 3670	"		(Should not appear)	
Testesman Ella M	FR uitvale 8863-J	"		*Testerman* Ella M	FR uitvale 8863-J
White Cyrus E	AS hberry 7345	"		White Cyrus E	AS hberry *3745*

9-19-35.

EXHIBIT "B"

Check of San Francisco Alphabetical Listing Errors and Omissions of May 1935 Bay Counties Directory Against Numerical Directory—San Francisco 1935-6.

San Francisco Alphabetical Errors May 1935 Bay Counties Directory			San Francisco Alphabetical Errors May 1935-6 Numerical Telephone Directory			Correct Listing Should Read		
Omitted			Omitted			Baciocco Frederick J	SK yline	1692
Bailey Minnie Mrs	PR ospect	8751	Bailey Minnie Mrs	PR ospect	8751	Bailey Minnie *E* Mrs	PR ospect	8751
Blakiston U G	HE mlock	4139	Blakiston U G	HE mlock	4139	*Blackiston V* G	HE mlock	4139
Omitted			Omitted			Bergner G	SU tter	7539
Best Richard E	RA ndolph	1942	Best Richard	RA ndolph	1942	Should not appear		
Biller John	FI llmore	8218	Biller J	FI llmore	8218	Biller John	FI llmore	*8276*
Bowden Henry Mrs	BA yview	1822	Bowden Henry Mrs	BA yview	1822	*Dowden* Henry Mrs	BA yview	1822
Bruner P M	OR dway	5107	Bruner P M	OR dway	5107	Bruner P M	*PR ospect*	*6394*
Card Myrtle	OR dway	9763	Card Myrtle	OR dway	9763	Should not appear		
Crowley Fagiola Torrison	OR dway	1373	Crowley Fagiola T Dr	OR dway	1373	Crowley *Fabiola* Torrison	OR dway	1373
Omitted			Omitted			Dalton J L	AT water	0332
Darling Gloria	OR dway	5208	Darling Gloria	OR dway	5208	Should not appear		
Omitted			Omitted			De Bretteville Alexander	OR dway	9358
Digrazia Guido P	WE st	1198	Digrazia G P	WE st	1198	*Di Grazia* Guido P	WE st	1198
Driscoll John G	SK yline	7017	Driscoll John G	SK yline	7017	Driscoll John *F*	SK yline	7017
Erkeley Sidonia M M D	WA lnut	0051	Erkeley Sidonia M Md	WA lnut	0051	Erkeley Sidonia M *Mme*	WA lnut	0051
Esperance Elizabeth Mrs.	HE mlock	8731	Esperance Elizabeth	HE mlock	8731	Should not appear		
Evans Phyllis	MA rket	1072	Evans Phyllis	MA rket	1072	Should not appear		
Garcia Marcos E	GR aystone	9087	Garcia M E	GR aystone	9087	*Gracia* Marcos E	GR aystone	9087
Graham H B Dr	PR ospect	4400	Graham H B Dr	PR ospect	4400	Should not appear		
Hayman J	SK yline	4069	Hayman J	SK yline	4069	*Haymann* J	SK yline	4069
Hooper Holmes Bureau	EX brook	0879	Hooper Holmes	EX brook	0879	Should not appear		
Omitted			Omitted			Horton Ross A	BA yview	6870
Husting Elizabeth	GR aystone	2272	Husting Eliz	GR aystone	2272	Should not appear		
Jacobs George R	OV erland	0485	Jacobs George R	OV erland	0485	*Jacob* George R	OV erland	0485
Juchlenz William	SK yline	4335	Juchlenz Wm	SK yline	4335	*Kuchlenz* William	SK yline	4335
Omitted			Omitted			Kane Chas F & Co	MA rket	0523
Keane Gene	DE laware	9062	Keane Gene	DE laware	9062	Should not appear		
Kimball Bernice M	PR ospect	3133	Kimball Bernice M	PR ospect	3133	Should not appear		
Liberty Cleaning & Dyeing			Liberty Cleaning & Dyeing	HE mlock	0311	Liberty Cleaning & Dyeing		
Works The	HE mlock	0311				Works The	HE mlock	*0100*
Masi L R	BA yview	8054	Masi L R	BA yview	8054	Masi L R	*SK yline*	*3592*
McKenney Carol Dr	TU xedo	2910	McKenney Carol Dr	TU xedo	2910	Should not appear		
McLaughin Charlotte	OV erland	7152	McLaughlin C	OV erland	7152	Should not appear		
Meade J Fred	UN derhill	4511	Meade J Fred	UN derhill	4511	Should not appear		
Omitted			Omitted			Parcells F M	DO uglas	2595
Peters Alma B	UN derhill	5364	Peters Alma B	UN derhill	5364	Should not appear		
Pittsburg Chemical Co.	EL kridge	4334	Pittsburg Chemical Co	EL kridge	4334	*Pittsberg* Chemical Co	EL kridge	4334
Powers John J	VA lencia	1879	Powers John J	VA lencia	1879	Should not appear		
Richbieth H W Mrs	HE mlock	3075	Richbieth H W Mrs.	HE mlock	3075	*Rischbieth* H W Mrs	HE mlock	3075
Robinson G Gilbert	WA lnut	3783	Robinson G Gilbert	WA lnut	3783	Robinson *C* Gilbert	WA lnut	3783
Severance Ford C	MI ssion	4694	Severance Ford C	MI ssion	4694	Severance *Fred* C	MI ssion	4694
Omitted			Omitted			Stark Charles M	GR aystone	0151
Sugarman Edw I	DO uglas	7167	Sugarman Edw	DO uglas	7167	Sugarman Edw I	DO uglas	*7168*

[Endorsed]: Filed Nov 25 1935.

[Title of Court and Cause.]

DEFENDANTS' AFFIDAVIT IN REPLY TO ORDER TO SHOW CAUSE.

State of California
City and County of San Francisco—ss:

Fred S. Leon, being first duly sworn, deposes and says:

1. That he is the party by that name sued herein as one of the parties defendant.

2. That he is the sole proprietor of and doing business as the Numerical Telephone Directory.

3. That the Numerical Telephone Directory referred to in the bill of complaint on file herein was prepared under affiants' personal supervision by a staff of employees employed [26] for that purpose; that a great amount of time was spent in compiling, arranging and collating the information contained in said directory, the work having been commenced in January 1935 and finished in July 1935.

4. That the circumstances which gave rise to the preparation and publication of the Numerical Telephone Directory were that the Plaintiff herein, The Pacific Telephone & Telegraph Company, for reasons best known to itself, refuses to furnish the general public gratis information as to the name of a subscriber to a particular telephone number; that it is impossible for a member of the general public to ascertain the name of a subscriber to a particular telephone number without actually calling the number in question, which is many times not desirable,

the only other method being the months of study required to locate the particular number in question in the alphabetical directory published by plaintiff.

5. That the Numerical Telephone Directory performs a service of distinct advantage not rendered by plaintiff's alphabetical directory and which plaintiff refuses to render members of the general public and is therefore for purposes other than those for which plaintiff's telephone directory was intended.

6. That the principal use to which affiants' Numerical Telephone Directory is put by the general public is as follows:

(a) One telephone user phones another and, finding him absent, leaves his phone number.

(b) The person called upon returning to his place of business may find several such numbers. If unfamiliar with a specific number, he refers to the Numerical Telephone Directory for identification of the source of the call, eliminating, as an element of time saving, those calls which he knows to be unnecessary or undesirable. [27]

7. That the use of affiants' book will not and does not impede or hamper the telephone using public because of numbers which have been discontinued or changed, for the reason that the principal use to which affiants' book is put consists in identification of the person whose telephone number has been left for call, and since such numbers are left by the subscriber himself it is presumed that he will give his correct number, even though plaintiff's then

current directory does not list the subscriber at all or does list him under some other number.

8. That among the purchasers of affiants' books are many of the leading banking, industrial and mercantile establishments of Alameda County and the City and County of San Francisco, and affiants' book has received widespread endorsement and approval as rendering a distinctly beneficial service not otherwise available to such purchasers.

9. That the purpose of affiants' Numerical Telephone Directory, is as aforesaid, to furnish a unique service incidental to the use of telephones and is of distinct benefit to the general public, including plaintiff's subscribers; that affiants' purpose in publishing his Numerical Telephone Directory was not to sell advertising space in said books; that it was affiants' original intention not to sell any advertising space whatsoever; that the space sold resulted from the insistent demand of merchants, tradesmen, the professions and others in business, and that the amount of space so sold is inconsequential in comparison with the books as a whole; that the advertising copy in defendants' Numerical Telephone Directory is original work created by affiant or advertisers therein, with two known exceptions and in those instances the subscribers delivered the material to be used to affiant and represented that such was their personal property.

10. Affiant does not deny that the May 1935 issue of plaintiff's telephone directory was employed

by him as the [28] source reference for the Numerical Telephone Directory, but affiant does deny that valuable and/or material portions of plaintiff's copyrighted books were copied or transferred into affiants' Numerical Telephone Directory or that any of the matter in affiants' book was copied from plaintiffs' books with substantially no change. Affiant further denies that the intellectual product of plaintiff, if any there be, was copied by him from plaintiff's books in the preparation of said Numerical Telephone Directory.

11. That it may be true that affiants' Numerical Telephone Directory contains errors and mistakes also contained in plaintiff's books but such would be the necessary result considering the fact that the plaintiff, being a public utility serving this territory exclusively, is the sole and original source of all information relative to telephone numbers, and plaintiff's telephone directories must be relied upon and plaintiff intends that they shall be relied on.

12. That in addition to publication of the book entitled "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935" affiant has published a book entitled "Numerical Telephone Directory San Francisco and other cities and towns 1935-6".

13. That affiant has caused Two Thousand (2,000) volumes of his two books, entitled as above, to be printed and published; that approximately Seven Hundred (700) volumes have been sold and approximately One Thousand Three Hundred (1,300) volumes remain unsold; that the sale price of each of said books is Seven Dollars and fifty

cents ($7.50) and Ten Dollars ($10.00), respectively; that affiant has on hand books worth the sum Thirteen Thousand Seven Hundred and Fifty Dollars ($13,750.00).

FRED S. LEON. [29]

Subscribed to and sworn before me, a notary public, this 25th day of November, 1935.

[Seal] VIOLET NEUENBURG,

Notary Public in and for the City and County of San Francisco, State of California. My Commission expires December 31, 1938. [30]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 25th day of November, in the year of our Lord one thousand nine hundred and thirty-five.

PRESENT: the Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

After hearing attorneys for the respective parties, it is ordered that the application for injunction pendente lite be granted, and that plaintiff give a bond in the sum of $20,000.00 upon said injunction. [31]

[Endorsed]: Filed Dec. 20, 1935.

[Title of Court and Cause.]

ANSWER OF DEFENDANT FRED S. LEON.

The defendant, Fred S. Leon, for answer to the Bill of Complaint herein, says:

I.

Said defendant admits the allegations of Paragraph I.

II. [32]

Said defendant admits the allegations of Paragraph II insofar as his citizenship is concerned, but denies that he is an inhabitant of the City of Oakland, County of Alameda, State of California, and alleges the fact to be that he is a resident of the City and County of San Francisco, State of California.

III.

Said defendant admits the allegation of Paragraph III.

IV.

Said defendant admits the allegations of Paragraph IV except as to the alleged cost of publishing plaintiff's telephone directories for the May, 1935 editions and denies that the sum was Two hundred ninety-five thousand and Two hundred and twenty-two dollars ($295,222.00) and alleges the facts to be that plaintiff either made a profit on the publication of said telephone directories for May, 1935 or charged the cost thereof to operating expenses and that the same was distributed prorata among plain-

tiff's subscribers and included in the prevailing rate for telephone service as allowed to plaintiff by the California Railroad Commission.

V.

Answering Paragraph V, said defendant states he has no information and belief and therefore denies the allegation in said paragraph contained.

VI.

Answering Paragraph VI of the bill of complaint herein, said defendant admits that plaintiff is the author and proprietor of said directories but denies that it duly copyrighted them under the Copyright Laws of the United States; denies that copyrights were secured unto plaintiff by publication of said directories accompanied by the statutory notice; but admits that plaintiff deposited copies of the said directories with the Register of Copyrights. [33]

VII.

Answering Paragraph VII of the bill of complaint herein, said defendant admits that affidavits accompanied the deposit of the copies of the said directory deposited with the Register of Copyrights but denies that the plaintiff had duly done or performed all acts or complied with all requirements necessary to establish its alleged rights to the aforesaid copyrights under the statutes of the United States in such cases made and provided, and denies that any rights could be established by plaintiff in said directories under the copyright Acts of the United States.

VIII.

Answering Paragraph VIII, said defendant admits that the Register of Copyrights issued to plaintiff alleged certificates of copyright of said issues of said directories but denies that said certificates are valid or that they establish in plaintiff the exclusive right to copy said directories.

IX.

Answering Paragraph IX of said bill of complaint said defendant states he has no information and belief and therefore denies that commencing with the issue of October 1908 and continuously thereafter to and including the May, 1935 issue of said directories plaintiff has duly or legaly copyrighted each of the said directories.

X.

Answering Paragraph X, defendant denies that the collection, editing, compilations, classification, arrangement or preparation of the material included in said directories required discretion, judgment, painstaking care, skill or experience of a high order and alleges the facts to be that the said work is mere routine arising out of plaintiff's legal duty to its subscribers as required of plaintiff by the California Railroad Commission. Said defendant admits that the result of [34] the labor of the persons employed or paid by plaintiff for those purposes before publication became the property of plaintiff insofar as those persons are concerned but denies that the same became the sole or exclusive property of plaintiff; denies that literary or other

rights arose out of the labor of the persons employed or paid by plaintiff for the purpose of preparing and publishing said directories or that plaintiff solely or exclusively possessed the alleged literary or other rights therein if any there were, and denies that plaintiff or anyone is or was entitled to copyright in said directories.

Answering Paragraph X further said defendant denies that said directories, or either of them, constitute or are, within the meaning of the Copyright Act, new or original literary works, or that the same are proper subject matter for copyright. Said defendant denies that there any any copyrights in said directories or any copyrights therein which are unexpired, still in full force or effect and denies that the plaintiff is the sole or exclusive owner, author or proprietor thereof.

XI.

Answering Paragraph XI defendant admits that plaintiff's telephone directories were employed by him in the collection, compilation, editing and preparation of the material included in his Numerical Telephone Directories and that there is a commonness of errors between plaintiff's directories and defendant's directory but denies the other allegations of said paragraph.

XII.

Answering Paragraph XII said defendant denies the allegations of said paragraph.

XIII.

Answering Paragraph XIII of the bill of complaint, defendant admits that at the time the bill of complaint herein [35] was filed he was at work in preparing a numerical telephone directory for the City and County of San Francisco, State of California, and avers that the same has since been published; admits the solicitation of advertisements therefor but avers that the space purchased therein is a mere incident to the main purpose of said book; admits the use of plaintiff's directories in the compilation of said books, but denies that said books are an infringement of valid copyrights subsisting in plaintiff's said directories, and avers that the use of plaintiff's directories by him was a fair use.

XIV.

Answering Paragraph XIV of the bill of complaint said defendant denies the allegations thereof.

XV.

Defendant admits that copies of his books were filed with the bill of complaint and that copies of plaintiff's directories were also filed but denies that plaintiff's said directories are copyrighted or that defendant's books infringe.

XVI.

Answering Paragraph XVI of the bill of complaint said defendant admits that at various times and places plaintiff notified said defendant of its claim of infringement of alleged copyrighted books but denies that in publishing his books he has in-

fringed or continues to infringe or threatened to continue to infringe valid copyrights alleged to subsist in plaintiff or that plaintiff has been damaged or injured by defendant's publication of his books.

XVII.

Defendant denies the allegations of Paragraph XVII of said bill of complaint.

AND BY WAY OF SEPARATE AND DISTINCT ANSWER AND DEFENSE, SAID DEFENDANT ALLEGES THE FOLLOWING:

[36]

1.

Answering said bill of complaint further, defendant Fred S. Leon alleges that the Numerical Telephone Directories published by him perform a service of distinct advantage not rendered by plaintiff's alphabetical telephone directory and which plaintiff refuses to render members of the general public and is therefore published and distributed for purposes other than those for which plaintiff's telephone directory was and is intended.

2.

Answering said bill of complaint further, defendant Fred S. Leon alleges that the facts and circumstances which gave rise to the preparation and publication of his Numerical Telephone Directories were that the plaintiff herein refuses to furnish the general public information as to the name of a subscriber to a particular telephone number; that

it is impossible for a member of the general public to ascertain the name of a subscriber to a particular telephone number without calling the number in question, which is many times not desirable, the only alternative being the endless task of searching through the list of telephone numbers in plaintiff's alphabetical directory, which numbers are not chronologically arranged.

3.

Answering said bill of complaint further, said defendant, Fred S. Leon, alleges that the use of the Numerical Telephone Directories published by him will not and do not impede or hamper the telephone using public because of numbers which have been discontinued or changed since publication thereof, because the principal use to which said books are put consist in the identification of the person whose telephone number has been left for call, and since such numbers are left by the subscriber himself there is no likelihood of his giving an incorrect or obsolete number for such purpose; that the [37] defendants' numerical telephone directories are as current and up to date as the May 1935 edition of plaintiff's alphabetical telephone directory.

4.

Answering said bill of complaint further, said defendant, Fred S. Leon, alleges that among the purchasers of his said numerical telephone directories are many of the leading banking, industrial and mercantile establishments of Alameda County

and the City and County of San Francisco, and that said book has received widespread endorsement and approval as rendering a distinctly beneficial and meritorious source not otherwise available to such purchasers.

5.

Answering said bill of complaint further, said defendant, Fred S. Leon, alleges that his purpose in publishing his Numerical Telephone Directories, as aforesaid, was not to sell advertising space in said books; that it was his original purpose and intention not to sell any advertising space whatsoever; that the sale of such space resulted from the insistent demand of merchants, tradesmen, the professions and others in business, and that the amount of space so sold is inconsequential in comparison with the books as a whole; that the advertising copy in defendants' Numerical Telephone Directories is original work created by defendant or advertisers therein, with two known exceptions and in those instances the subscribers delivered the material to be used to defendant and represented that such was their personal proprty.

6.

Answering said bill of complaint further, defendant, Fred S. Leon, alleges that in the compilation and preparation of his Numerical Telephone Directories he referred to the May 1935 issue of plaintiff's alphabetical telephone directory, which is [38] the sole source of current information relative to telephone subscribers arranged in alphabetical form; that it necessarily followed that errors in plaintiff's

alphabetical telephone directory would be repeated in defendants' numerical telephone directories, but defendant denies that in making such use of plaintiff's said book he copied or appropriated original language or literary arrangement therefrom or in any way infringed the same.

7.

Answering said bill of complaint further, and as a further, separate and special defense, said defendant, Fred S. Leon, alleges that plaintiff's alphabetical telephone directories, and particulary the May 1935 issue thereof, consist of matter which is wholly devoid of and lacking in originality or literary concept or language or arrangement, and matter which Plaintiff is obligated to publish in the manner and form alleged under the law as a public utility pursuant to orders of the California Railroad Commission, and therefore said directories are not proper subject matter for copyright under the Copyright Acts of the United States.

8.

Answering said bill of complaint further, and as a further, separate and special defense, said defendant, Fred S. Leon, alleges that the plaintiff in publishing its said alphabetical telephone directories intends that the same shall be used; that they are intended primarily to apprise others of such facts as they contain; that anyone may produce facts therein contained and put them to fair use, and that the use to which said defendant has put them is an example of such fair use.

9.

Answering said bill of complaint further, and as a further, separate and special defense, said defendant, Fred S. [39] Leon, alleges that the alleged cause of action set forth in the bill of complaint on file herein is barred by reason of laches and plaintiff is estopped to maintain its action. Persons other than the defendant herein, subsequent to the year 1908 in which year plaintiff alleges it began publication and copyrighting of its alphabetical telephone directories, have published various numerical and alphabetical telephone directories including therein the names, addresses and telephone numbers of plaintiff's subscribers taken from plaintiff's alleged copyrighted alphabetical telephone directories; that plaintiff has had knowledge of the publication of such numerical and alphabetical telephone directories and has acquiesced in such publication, whereby defendant herein has been led to believe that plaintiff consented and had no objection to such publication of numerical and alphabetical telephone directories including the names, addresses and telephone numbers of its subscribers taken from its said alphabetical telephone directories, and by reason thereof said defendant has made a large investment of time and money in the preparation and publication of his said numerical telephone directories, and by failure to assert its alleged rights against such publication of the aforesaid numerical and alphabetical telephone directories by persons other than the defendant herein, plaintiff is guilty of laches and is estopped to maintain this action, or to demand damages.

Wherefore, defendant, having fully answered the bill of complaint, denies that the plaintiff is entitled to any part of the relief demanded, and prays to be hence dismissed with his costs and reasonable attorneys fees in his behalf most wrongfully sustained, and defendant will ever pray.

JAS. M. NAYLOR
ARTHUR P. SHAPRO
Attorneys and Solicitors
and Defendants. [40]

San Francisco, Calif.,
Dated: December 19, 1935.

Acknowledgment is made of receipt of copy of the foregoing answer, this 20th day of December, 1935.

PILLSBURY, MADISON & SUTRO
Attorneys for Plaintiff [41]

[Endorsed]: Filed Dec. 20, 1935.

[Title of Court and Cause.]

ANSWER OF DEFENDANT DAGMAR LEON

The Defendant, Dagmar Leon, for answer to the Bill of Complaint herein says:

I.

That she is a citizen of the United States and residing in the City and County of San Francisco, State of California. [42]

II.

Said Defendant denies each and every other allegation of said Bill of Complaint, except the allegations contained in Paragraph I of said Bill of Complaint.

III.

Answering said Bill of Complaint further said defendant avers that she is the wife of the defendant Fred S. Leon; that she has no proprietary interest in the business conducted by the said Fred S. Leon under the name and style, Numerical Telephone Directory; that she is a mere employee in said business; and that she has been improperly joined herein as a party Defendant.

Wherefore, said Defendant Dagmar Leon prays the judgment of the court whether she shall be compelled to answer further, and prays that the Bill of Complaint may be dismissed with her costs and reasonable attorneys fees in her behalf most wrongfully sustained and said Defendant will ever pray.

JAS. M. NAYLOR
ARTHUR P. SHAPRO
Attorneys and Solicitors
for Defendants

San Francisco, Calif.,
Dated: December 19, 1935.

Acknowledgment is made of receipt of a copy of the foregoing answer, this 20th day of December, 1935.

PILLSBURY, MADISON & SUTRO
Attorneys for Plaintiff [43]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 10th day of March, in the year of our Lord one thousand nine hundred and thirty-six.

Present: the Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

This case came on regularly for trial. N. Korte and James O'Brien, were present as attorneys for plaintiff. J. M. Naylor and Arthur P. Shapro, were present as attorneys for defendants. Counsel for respective parties made a statement as to the nature of the case. Plaintiff called certain persons as witnesses and each duly sworn and examined, to-wit: Henry R. Wolteman, Howard L. Van Orden, Percy R. Clements and A. C. Calendar and introduced in evidence certain exhibits which were filed and marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15 and 16. Plaintiff presented another exhibit for identification which was filed and marked 14, and plaintiff rested. Counsel for defendant thereupon moved for Order dismissing the case as to defendant, Dagmar Leon, which motion the Court ordered denied and exception entered. Defendants called certain persons as witnesses and each duly sworn and examined, to-wit: Fred S. Leon, William E. Church and Mrs. Dagmar Leon, and defendants rested. Plaintiff recalled Percy R. Clements as a witness and

was further examined and introduced in evidence an exhibit which was filed and marked 17 and plaintiff rested. Thereupon after hearing attorneys, ordered that briefs be filed in 10—10 and 5 days, and case be then submitted.[44]

[Endorsed]: Filed April 29, 1936.

[Title of Court and Cause.]

MEMORANDUM OF DECISION

Upon the issues raised at the trial and submitted for decision, (1) as to the validity of plaintiff's copyright of its telephone directory, and (2) as to the infringement of plaintiff's copyright by defendants, I am of the opinion that the copyright is valid and has been infringed, and so find. Plaintiff is entitled to a decree making the preliminary injunction heretofore issued permanent, and to judgment for its costs.

Findings of fact, conclusions of law, and decree may be submitted by counsel for plaintiff.

Dated: April 29, 1936.

A. F. ST. SURE
United States District Judge [45]

[Endorsed]: Filed May 22, 1936.

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 10th day of March, 1936, before the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, upon the issues of fact and law made by the complaint and answer thereto. Plaintiff appeared by its attorneys, Messrs. Pillsbury, Madison & Sutro, and defendants appeared by their attorneys James M. Naylor, Esq., and Arthur P. Shapro, Esq. Thereafter documentary and oral [46] evidence was presented, oral argument heard and memoranda filed, and the cause submitted to the court for decision. The court having considered the evidence and arguments of counsel, now makes these

FINDINGS OF FACT

I.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, State of California, within the Northern District of California, in the Southern Division thereof, and is engaged within said city and county and district and elsewhere in said state in the business of furnishing general telephone and telegraph service.

II.

Defendants are citizens of the United States and inhabitants of the City and County of San Francisco, State of California, in the Northern District of California, in the Southern Division thereof.

III.

This is a suit arising under the copyright Act of the United States.

IV.

In connection with furnishing said telephone service, plaintiff has published and caused to be printed and distributed to its subscribers, at frequent intervals since October, 1908, alphabetical directories of its subscribers, setting forth in alphabetical order their names, addresses and telephone numbers, among which are those now entitled "Telephone Directory, San Francisco and Bay Counties, May, 1935" and "Telephone Directory, Oakland, Alameda, Berkeley, San Leandro and Bay Counties, May, 1935". Plaintiff has duly and regularly copyrighted each [47] edition of said directories, and the Register of Copyrights at Washington, District of Columbia, has issued to plaintiff for each edition of said directories his certificate of copyright.

Plaintiff compiled, printed, issued and on April 29, 1935, published an edition of said "Telephone Directory, San Francisco and Bay Counties, May, 1935" and an edition of said "Telephone Directory, Oakland, Alameda, Berkeley, San Leandro, and Bay Counties, May, 1935", each of which it duly and

regularly copyrighted and for each of which the Register of Copyrights at Washington, District of Columbia, issued to plaintiff a certificate of copyright. All copies of said May, 1935, editions of plaintiff's said telephone directories were printed from plates made within the limits of the United States, from type set therein, and the printing of the text and binding of said directories was performed within the United States. Thereafter plaintiff published the same within the limits of the United States, which was the first publication thereof, with a notice of copyright affixed on the title page of each copy thereof, as follows: "Copyright, 1935, by The Pacific Telephone and Telegraph Company." After securing said copyright by publication with said notice of copyright, plaintiff promptly deposited in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition of said May, 1935, directories then published, which were accompanied by affidavits under the official seal of an officer authorized to administer oaths within the United States, duly made by plaintiff's authorized agent residing in the United States, setting forth that plaintiff had duly done and performed all acts and complied with all requirements necessary to establish its rights to said copyrights under the statutes of the United States in such cases made and provided, and that plaintiff had paid the fees required by the Copyright Act. [48]

V.

The collection, editing, compilation, classification, arrangement, preparation of the material in said directories and the publication of said directories involved a large amount of detail and required great effort, discretion, judgment, painstaking care, skill, labor, accuracy, experience and authorship of high order. Said telephone directories were the sole and exclusive property of plaintiff, and plaintiff possessed the sole and exclusive literary and other rights therein, including the right to copy. Said directories constitute new and original literary works, and are the proper subject of copyright. Said copyrights are existing and plaintiff is the sole and exclusive owner, author and proprietor thereof.

VI.

The copyright of plaintiff'ss said May, 1935, directories is valid.

VII.

Defendants have compiled, published and sold to the public numerical telephone directories entitled "Numerical Telephone Directory, San Francisco and Other Cities and Towns, 1935-36" and "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935". These numerical directories of defendants were compiled exclusively and solely from plaintiff's May, 1935, directories. Defendants' sole source of information in compiling said numerical directories was plaintiff's said directories. Defendants copied and transferred into said numerical directories, without the con-

sent or license of plaintiff and in violation of plaintiff's rights under its copyrights, valuable and material portions of plaintiff's copyrighted May, 1935, directories, and thus saved themselves the expenditure of a large amount of time, labor and money. Defendants took and appropriated to their own use the entire portion of the alphabetical sections of plaintiff's May, 1935, directories, and did not ob- [49] tain any of the information contained in their numerical directories from original sources or from any source other than plaintiff's said directories. Defendants' said copying of plaintiff's said directories was deliberate and premeditated and infringement constituted ~~piracy and plagiarism~~ [A. F. St. S.] of plaintiff's said directories.

VIII.

Defendants have infringed plaintiff's copyrights of its May, 1935, directories.

From the foregoing Findings of Fact the court makes these

CONCLUSIONS OF LAW

I.

Plaintiff is entitled to a permanent injunction restraining defendants, and each of them, as a firm and as individuals, as well as their associates, servants, employees, attorneys and assigns, and each of them, from directly or indirectly printing, publishing, selling, delivering or disposing of, or causing or permitting the printing, publication, sale delivery or disposition of said "Numerical Telephone Directory, San Francisco and Other

phone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935", or any other directory or book of any class or description, copied, in whole or in part, from plaintiff's said telephone directories entitled "Telephone Directory, San Francisco and Bay Counties, May 1935" and "Telephone Directory, Oakland, Alameda, Berkeley, San Leandro and Bay Counties, May 1935", and each and all and every part and portion thereof.

II.

Defendants, and each of them, are required to deliver up on oath for destruction all copies of their "Numerical Telephone Directory, San Francisco and other Cities and Towns, 1935-36" and "Numerical Telephone Directory, Oakland, Berkeley, Alameda, [50] San Leandro, 1935," which have been heretofore printed, and all plates, molds, matrices, or other means for making said infringing numerical telephone directories.

III.

Plaintiff herein is entitled to recover its costs of suit from defendants, and each of them.

(Signed) A. F. ST. SURE
Judge of the District Court
of the United States

Not approved as to form, as provided in Rule 22 for reasons to be embodied in proposed exceptions to be prepared by J. M. Naylor, Esq.

ARTHUR B. SHAPRO
Attorney for Defendant

Receipt of a copy of the within findings and conclusions of law is hereby admitted this 4th day of May, 1936.

JAS. M. NAYLOR and
ARTHUR B. SHAPRO
Attorneys for Defendants. [51]

[Endorsed]: Lodged May 4, 1936. Filed and entered May 22, 1936.

In the Southern Division of the District Court of the United States, for the Northern District of California

In Equity—No. 3943-S

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Plaintiff,

vs.

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co.,
Defendants.

DECREE GRANTING PERMANENT INJUNCTION

This cause came on for further and final hearing at this term, upon the evidence of all parties hereto, and was argued by counsel, and thereupon, upon due consideration thereof, it was ordered, adjudged and decreed as follows, to-wit:

1. The preliminary injunction entered in this cause on the 25th day of November, 1935, be and the same is hereby made permanent and perpetual against the said defendants and each [52] of them.

2. Defendants and each of them, as well as their associates, servants, employees, attorneys and assigns and each and all of them, are permanently enjoined and restrained from directly or indirectly printing, publishing, selling, delivering or disposing of or causing the printing, publication, sale, delivery or disposition of those certain telephone directories entitled "Numerical Telephone Directory, San Francisco and Other Cities and Towns, 1935-36" and "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935" or any other directory or book of any class or description copied in whole or in part from plaintiff's "Telephone Directory, San Francisco and Bay Counties, May, 1935" or from plaintiff's "Telephone Directory, Oakland, Alameda, Berkeley, San Leandro and Bay Counties, May, 1935", and each and all and every part and portion thereof.

3. It is further ordered, adjudged and decreed that the defendants and each of them are to deliver up on oath to the United States Marshal for the Northern District of California for destruction all copies of their telephone directories mentioned in paragraph 2 of this decree which have heretofore been printed, and all plates, molds, matrices, or other means for making said infringing telephone directories.

4. It is further ordered, adjudged and decreed that the costs herein in the sum of $..... to be taxed by the clerk of this court be paid by the defendants to the plaintiff.

Dated: May 22, 1936.

A. F. ST. SURE
Judge of the District Court
of the United States

Not approved as to form, as provided in Rule 22 for reasons to be embodied in proposed exceptions to be prepared by J. M. Naylor, Esq.

ARTHUR B. SHAPRO
Attorney for Defendants [53]

[Endorsed]: Filed Nov. 27, 1936.

[Title of Court and Cause.]

DEFENDANTS' PROPOSED STATEMENT OF EVIDENCE ON APPEAL AS REQUIRED BY EQUITY RULE 75.

Come now the defendants and appellants above named, and submit the following as their proposed statement of evidence to be used upon the appeal heretofore allowed in the above matter as required by Equity Rule 75: [54]

This cause came on for trial in the District Court at San Francisco, California, Hon. A. F. St. Sure, presiding. The trial commenced on March 10, 1936, and was concluded on the same day.

The following is the testimony of the witnesses in narrative form:

HENRY R. WOLTMAN

Witness called by the plaintiff testified substantially as follows:

I am the directory manager of the Pacific Telephone & Telegraph Company in this area. It is the publication of and gathering together of information that is used in the publication of the telephone directories in this area, San Francisco, Oakland and so on; that is under my supervision. I have other employees under me. There is a regular department of the company devoted to the compiling and publication of the telephone directories.

In listing our customers in the directory, the first thing we take from a customer is the application for service, and determine from him the directory listing, the name, address, etc. That application is kept in our business office. The application is not kept alphabetically. It is kept by telephone number order. They are divided up by prefix. By "prefix" I mean the name of the exchange in which the particular subscriber's name is, like the name "Atwater". This is an application purporting to be the application of "Bailey, Minnie E. Mrs." This is what we call the basic record of our subscriber. The telephone number is in this corner, here, looking at the upper right-hand corner. The number of Mrs. Bailey's last telephone is Prospect 8751. Originally it was Ordway 1019. When it was Ordway 1019 this record was kept in our business office in a file with all of the other subscribers having the Ordway prefix. They are kept in numerical

(Testimony of Henry R. Woltman.)

order in that file. When the number was changed to that prefix, to that [55] Prospect number, an order was issued from the business office to change it. Then the card was transferred from the Ordway file to the Prospect file, to its corresponding place numerically.

The telephone company issues a directory for the San Francisco subscribers. That directory is in one volume. The make-up of the volume for the San Francisco subscribers is, first, the San Francisco alphabetical directory section. All of the subscribers in San Francisco who had service at the time of the directory closed are listed in the alphabetical section. Generally speaking, the alphabetical section for San Francisco contains only San Francisco subscribers. There are other sections to that volume. The San Francisco Classified Section. Then the Oakland, Alameda and Berkeley sections, and other Cities and Towns section. There was an issue of the San Francisco Directory by the telephone company for May, 1935. The volume labeled "San Francisco and Bay Counties", filed on November 8, 1935, is the directory I had in mind.

(There was offered and received into evidence plaintiff's Exhibit 1, which consisted of a copy of the San Francisco Telephone Directory issued May, 1935.)

There was also a directory issued in May, 1935, for Oakland, Alameda and Berkeley and other Bay Counties. The directory to which I refer is the one filed on November 8, entitled "Oakland, Alameda,

(Testimony of Henry R. Woltman.)

Berkeley, San Leandro and Bay Counties, May, 1935".

(There was offered and received into evidence plaintiff's Exhibit 2, which consisted of a copy of the Telephone Directory for Oakland, Alameda and Berkeley, and other Bay Counties, May, 1935.)

The telephones, the directory listings for the customers, our subscribers in Oakland, Alameda and Berkeley are contained in [56] the alphabetical section for the second directory, Plaintiff's Exhibit 2, Oakland, Alameda, Berkeley and San Leandro. This directory has other sections in addition to the alphabetical section, namely, Other Cities and Towns and a classified section for Oakland, Alameda and Berkeley. By "Other Cities and Towns", I mean the towns in San Mateo County and some in Marin County. The San Francisco alphabet is also contained in the Oakland volume.

Such a directory was issued for San Francisco in 1908, October, and they have been issued periodically since that time. They were always divided into these two volumes, the San Francisco volume and the Oakland, Alameda, Berkeley and San Leandro volume.

Phillips & Van Orden, of San Francisco, printed the May, 1935, directory under arrangement with the telephone company, and they were paid by the telephone company. The San Francisco directory is distributed in San Francisco, the city and county of San Francisco, to the subscribers for service. Assuming there are one hundred and sixty thou-

(Testimony of Henry R. Woltman.)

sand (160,000) listings in the alphabetical section of the San Francisco directory more than that number of directories might be distributed because we very often have customers who want more than one book and if they have service telephones they may want a book at the different telephones.

In May, 1935, or at the closing date, there were 243,100 telephones being served by the San Francisco Exchange in San Francisco. By "closing date" I mean the time when we closed the directory for further changes, that is on March 23, 1935. After that date we received no more listings for the next issue of the directory. That issue was May, 1935, and we received no more listings for publication.

The number of telephones in Oakland, Alameda, Berkeley and San Leandro was 120,784. The number of listings in the San [57] Francisco alphabetical section for May, 1935, was 160,266 and for the Oakland, Alameda and Berkeley alphabetical section 97,512. Every telephone is not necessarily listed in the telephone directory but there may be a telephone directory distributed for every telephone.

I have an exhibit here that shows how our detail is made up for the alphabetical section of the San Francisco directory. The application card that I referred to before contains the listing as it appears in the directory. From that application card our business office prepares and issues an order which covers the installation of the service it lists in the

(Testimony of Henry R. Woltman.)

directory, and there is a copy for the directory work, which contains the information. That is then inserted on our transcript. This is a copy of the manuscript. That is an order issued by the business office to the directory department from this application, the application of Mrs. Minnie E. Bailey. This is a part of our vital records.

Referring to the manuscript, immediately upon the issuance of a directory we then cut up columns and paste them on sheets of paper in this fashion, and that serves as our manuscript for the next book. The page I have in my hand is a manuscript for that particular directory, that is, the May, 1935, issue of the San Francisco alphabetical section. This is part of the letter B and the Minnie E. Bailey listing appears thereon. As changes occur, advice of which is received through the medium of these orders, proof is prepared, slips, and if it is new matter they are pasted down here, and the old listing is lined out.

The new listings are prepared in the form shown in the second column from the left-hand edge of the page. We paste the columns cut from our directory on the right-hand side of the page and new matter is entered in the next column over from that. The new matter is typed. This is done with every column in the alpha- [58] betical section of the San Francisco directory and we have a single sheet for every column. (There was offered and received into evidence plaintiff's Exhibit 3, consisting of a

manuscript of the alphabetical section of the May, 1935, San Francisco Telephone Directory.)

The manuscript is kept up daily and during the progress of the work copy is sent to the printer, from which he casts the linotype slugs that are used for the book. The printer, as he casts these slugs, returns the proof to us, which we verify and then at the end of the period, after the closing date that I mentioned, the whole manuscript is sent to the printer, and from that he completes the work of assembling all of the slugs in proper order, etc., and proceeds with the plates for printing the book.

(Following discussion it was stipulated on behalf of the defendants as to the process through which this particular telephone directory is prepared, compiled and published.)

The proof reading is done by both ourselves and by the printer. Following the proof reading and prior to the closing date we make changes and corrections in the original copy or manuscript. Taking this particular directory, the closing date was March 23rd and after that date we did not accept any new listings or "disconnects". The only corrections we would make after that would be errors in the listing, changes found in proof reading. There would be no additions or detractions from the number of alphabetical listings. The classified section is arranged by us and we keep a manuscript of this section very similar to that of the alphabetical section, except it is in the classified order. It has copies of all of the advertisements and those adver-

(Testimony of Henry R. Woltman.)

tisements are all arranged. Changes are made in them regularly as they occur, that is daily, if they would occur daily. We have a con- [59] tract for the distribution of the telephone directory. All told, about 100 people are employed regularly in the Directory Department. They don't all work all the time on this book, but about 100 in my department. Some of them work exclusively on the book. At this time, in what we call our compilation section, which is the manuscript, we had eight (8) people full time on the alphabetical directory and four (4) on the classified, and part time throughout the period there were eight (8) more on alphabetical and one (1) on classified. This number would increase after the closing date.

I have a tabulation of the cost to the telephone company of the compilation, issuance and printing and distribution of the San Francisco and Oakland directories for the May issue of 1935. The total figure for both sides of the Bay was $295,222. Breaking that down, the total expense for Exhibit 1, the San Francisco directory, was $203,572, which is the over-all cost of compiling, printing and distributing the directory to the subscribers. The Oakland cost was $91,649 covering the same costs as enumerated for the San Francisco directory.

There were 109,407 changes in the San Francisco alphabetical section occurring in the May issue of the 1935 directory from the time it was issued until the next directory was issued this year. The num-

(Testimony of Henry R. Woltman.)

ber of changes is approximately thirty per cent (30%) of the number of listings, that is the number of new listings in the succeeding directory is about thirty per cent (30%) of what occurred before. For each of those 109,000 we went through the routine and procedure of editing described in connection with our manuscript sheet. There were 60,751 changes for the Oakland alphabetical section.

Since the October 1908 directory for San Francisco, directories have been issued periodically and they vary in the period for which they were issued from a minimum of four months to [60] a maximum of eight months. I have made a comparison of the May, 1935, directory listings with a 1909 directory. I think it was the October issue.

The listings in the May, 1935, directory were compared with the listings in the February, 1909 directory, by taking the first ten listings of each letter of the alphabet, and we found one listing the same in San Francisco and none in Oakland.

(There was offered and received in evidence plaintiff's Exhibit 4, consisting of a written memorandum showing the comparison of the 1935 and 1909 directories.)

There is one correction I would like to make. In the East Bay section we checked six listings under each letter of the alphabet, and in San Francisco ten under each letter of the alphabet. We found

(Testimony of Henry R. Woltman.)

no listing in the East Bay and one in San Francisco, for the W. O. Hardware Company.

I know of no alphabetical directory listing the telephone subscribers that is put out in San Francisco or Oakland, other than the ones put out by the telephone company. The telephone company receives a certain amount of revenue from the classified section of its directory. The approximate figure per issue for the two directories is $427,484. I mean the Oakland and San Francisco issues. That figure is for the May, 1935 directory.

There are some introductory pages prepared by us which give information of value in regard to the operation of the telephones, the rate information, etc., long distance rate information, etc. This appears in the opening pages of our directory.

I have seen copies of the numerical telephone directory put out by the defendants in this case. I have seen both the San Francisco and Oakland issues.

(There was offered and received in evidence plaintiff's Exhibits 5 and 6, consisting, respectively, of copies of the San [61] Francisco numerical Telephone Directory for 1935-1936 and the numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935.)

I have examined both of these numerical directories. It is my opinion that the issuance of the Numerical Directory is not good for our business.

(Testimony of Henry R. Woltman.)

The reason for that is this: There are several reasons. First of all, while we don't like to admit it, we do make some mistakes in the issuance of our own directories. When mistakes are copied in this directory then that directory, of course, has a great deal of obsolete material in it. It becomes obsolete rapidly, and that is out in the hands of the public. By obsolete I mean, as telephones are connected, of course, they do not appear in this directory, and as they are disconnected they still continue to appear. Of course, that is true of our own directory, too, but we offer our own information service, which takes care of that. There is another way in which it affects the telephone service. There are instances of where we may have to reassign telephone numbers due to lack of facilities, or for various reasons, and then that telephone would appear in—would be under somebody else's name than would appear in this directory. For example, John Doe has a certain telephone number, and it appears in our directory, and similarly appears in the numerical directory. Then, due to the exigencies of the service, sometimes during the life of the directory this particular telephone service for John Doe is disconnected, and we have to use that telephone number for another subscriber. Then the old name will appear in this directory, in the Numerical Directory, and anybody looking up that number in the Numerical Directory will find the name of somebody who is not now the subscriber to that telephone. If

(Testimony of Henry R. Woltman.)
they called that number they would get the new subscriber instead of the name as shown there. [62]

Cross Examination

There would be quite an interval of time elapsing before there is a reassignment of a cancelled number. I could not tell definitely the exact amount of time but it would be after sufficient time had elapsed and there would be few, if any, calls being placed for the old number. It might be before the telephone company had published a new directory but as a general rule it is not. We try not to reassign numbers during the life of the directory in which they appear. I could not say offhand what percentage of the yearly changes would comprise such reassignment of numbers. It would be a relatively small percentage. I should say probably less than one per cent. I do not think this is a small objection to a numerical telephone directory because there still would be a possibility of people getting the wrong name from it, and that may cause difficulties that would reflect on us. In that instance we would get two calls instead of one. As to the numerical telephone directory containing obsolete material the same is true of the telephone company's alphabetical directory. As to certain numbers and certain information contained therein it is obsolete the day it comes off the press. When a person is mis-guided by the use of the alphabetical telephone directory and calls a number given there

(Testimony of Henry R. Woltman.)

which is incorrect according to the change made subsequent to the publication of the directory, he gets our intercepting operator. This operator would advise the person making the call to call information, as the general thing, and that there has been a change. If the telephone had been disconnected she would say so. The same would be true of a number called from the numerical telephone directory and the call would go through the same mechanics. I understand that a numerical telephone directory is used very largely for check-up on names of somebody, some person who has called and left a number. [63]

Q. Does the telephone company supply the public with such a service?

A. We don't issue a directory on that basis.

Q. Do you provide the service?

A. It is possible to obtain it.

Q. Through what means?

A. On proper showing at the business office.

By "proper showing" I do not mean that we would require an affidavit. What I mean is this, that we have always looked upon the telephone numbers, the listings in our telephone directories, as being a part of the service we furnish to the subscriber, and while he is not given any proprietary interest in it, nevertheless as long as he is the subscriber and the listing is a very vital thing to him, we agree with him in the manner in which it shall appear in the telephone directory and consider it as a part of his service. So we feel that he is

(Testimony of Henry R. Woltman.)

entitled to have that listing continue in that manner, and not be tampered with and sent around in some other way and used for some purpose that he might not care for. In other words, he has never been consulted on this other matter at all. So then if a customer, another subscriber, has some particular reason for finding out a telephone number, the name attached to a certain telephone number, and comes to our business office and explains why he wants the information, and if it is for a reasonable purpose we will furnish it. As a general thing the telephone company determines the reasonableness of the purpose, except in connection with what we call our non-published listings. Those are listings that we do not publish in our directory, having been so requested by the subscriber that those numbers or names be not given out for any purpose. We furnish this numerical telephone service to the general public as I have described. There are no preferred customers to whom the service [64] is given. It is given to the Police Department, on a proper showing; a court order, of course, would get any information that we have to give. The Fire Department and others would be entitled to obtain such information upon a similar proper showing.

Our company is the author of the preliminary pages. Of course, this is a matter of continuous usage, etc. We have changes in the business that have to be taken care of. For example, the methods of dialing, when dial telephones were introduced. At the time that we introduced the dial service,

(Testimony of Henry R. Woltman.)

prior to that time, "How to use the telephone" had been confined to the use of manual telephones, etc. This is a matter that changes from time to time, and the information is prepared by certain people in the company. Not necessarily always the same, but it is officially gone over and edited and put in the book. I edit some of it, but not all of it. The matter would appear in the previous issue and would be used as the basis, and then any changes that were introduced, and it was cleared through the office of our Commercial Engineer, Mr. Chapman, who handles matters having to do with rates and rate practices. This all ties in to rates and rate practices. The same is true as to plaintiff's Exhibit 2, the Oakland directory. The introductory pages of the San Francisco and Oakland directories are not identical. The equivalent pages in the Oakland directory were prepared under Mr. Chapman's supervision.

The pages between the end of the San Francisco alphabetical section and the first page of the classified section are what we call filler. It comprises an institutional advertisement of the telephone company. There is also an institutional advertisement at the end of the classified section. There are seven pages, enough to make up a 32 or 54 page form in the printing operation. I am not the author of those advertisements. That is done through our information and publicity departments. I don't [65] know who the author was. There are similar pages at the

(Testimony of Henry R. Woltman.)

end of the Oakland, Berkeley and San Leandro section, to fill up the forms. Institutional advertising is also interposed between the sections of plaintiff's Exhibit 2. It is for the same purpose and the authorship is the same.

The sum of $295,222 represents the cost of the directory; that is, plaintiff's Exhibit 1 and 2. This figure covers the preparation of the copy, the manuscript (service of employees of the telephone company under my supervision), then the printing, binding, and transportation, and paper. It also includes the money paid to our printers and to the paper house. Then, there is distribution; that is, the delivering of the directory to our subscribers, and soliciting advertising. Those are the principal expenses. The item of $295,000 does not include cost items incurred in bringing about the receipts from the classified sections because we would issue a directory whether we had any classified section or not. The figure of $295,000 includes the cost of soliciting advertising.

The telephone company actually makes a profit from the business of publishing a telephone directory. The profit would be the difference between the gross receipts for the classified or some other figure subtracted by $295,000 gross. The deduction of the gross expense from the gross revenue would give the profit.

In addition to the figure $427,000 gross there is one other item. That is a deduction in distribution,

(Testimony of Henry R. Woltman.)

because we have to account for the sale of the old directories we take up. Whenever we make a directory delivery we exert every effort to bring in the old books that are obsolete, so as to get them out of circulation.

Q. Is there any income from the telephone directory other than the yellow section, or classified section?

A. Oh, a small amount of sales of directories. People come in and want extra books. There is a small amount of that.

The charge for bold faced listing is in the advertising [66] revenue. None of that is done in the regular alphabetical section. Years ago it was done but it has been discontinued for some time. We have no advertising in the alphabetical sections.

The 1909 telephone directory mentioned on direct examination was copyrighted. I was not connected with the telephone company in the years 1908 or 1909. We have a certificate of copyright for the 1908 directory.

The telephone company made a profit in the business of publishing and distributing the May, 1935, issue of the telephone directory. The same has been true of other years. I am not prepared to say every year, but other years, yes. I have not been in directory work all of that time. I have been in directory work off and on since 1918, but not entirely with the Pacific Company. I was with another telephone company during a part of that time. As a general rule I would say that a profit is made.

(Testimony of Henry R. Woltman.)

The telephone company has just published a new directory. I cannot say absolutely whether the publication of that particular directory has been hurt in any way, or was hurt in any way by the defendants' publication of its Numerical Directories, for this reason, that when complaints are received of difficulties in placing numbers and getting calls, etc., it is our practice to straighten out the difficulty, give the customer the information, whatever the nature of the case may be, as rapidly as we can, and without questioning him. So in our complaint records the source of a complaint would not show. That is to say, whether it was a mistake in the numerical directory, or whatever it might be.

I cannot say absolutely that there has been any damage or not, of my own knowledge, but, of course, from general knowledge of the condition I would say there have been difficulties. It is not a fact that the principal objection the telephone company has to the numerical directory is the loss of revenue from return [67] calls not being made after the identity of the caller is ascertained by use of the numerical directory. There might be a loss of revenue, but I am not concerned with that. The company is not concerned with that. The principal objections that we have are the objections that I stated earlier, that these directories, these numerical directories are issued—they are sold, and they are in circulation for a greater or shorter length of time, depending on how long the people use them, and they are not required—they are just

(Testimony of Henry R. Woltman.)

there, and we find that difficulties occur in our service as obsolete books are left in circulation, and that is the reason why we exert every effort to bring back and retrieve all of our phone books that have been previously distributed. That is our continuous experience. There is no positive indication that that is going to be the case here except the new numerical directories have not yet been issued. The book, the Numerical Directory, is sold, as I understand it, and becomes the property of the purchaser, and so if the purchaser wishes to retain it he can. The telephone directory that we issue is the property of the company, and one of our conditions of service is that it is taken out of service upon the distribution of a new one. In that way we get all the old ones out of service, and get the obsolete information out of the hands of the public.

Supposing the same practice were followed here, the objection would stand, because of the fact other books are copied from ours, and, therefore, they are later than ours, and use all of the obsolete matter, and any errors, etc. that we may make, that is all perpetuated.

Redirect Examination

Q. In other words, Mr. Woltman, in addition to what you have stated, you object to their copying from your directory?

A. That is right.

Q. Now, one other point that I want to make clear. That [68] is the giving of information by the

(Testimony of Henry R. Woltman.)

name and address of the subscriber when merely the telephone number is known. Some question was asked you by Mr. Naylor if there were preferred subscribers, he mentioned the Police Department and Fire Department. Will the name and address of a subscriber be given to a member of the general public who would appear at the business office and make a proper request?

A. Yes.

Q. That is, without regard to the class?

A. Yes.

Q. Or their position?

A. Yes.

Q. Whether it is private or official?

A. That has nothing to do with it.

Recross Examination

Q. Who determines the propriety of a request?

A. The people in the business office, the manager.

Q. The manager of the business office?

A. Yes.

Q. In other words, he is the sole arbiter of that, of the propriety of a particular request?

A. Well, we have general regulations from experience, etc. that we have worked out. I will give you an example, if you like. If a customer comes to us and finds himself charged on his telephone bill for a certain long distance call, and it is charged only by number, and he would like to find out who it was who placed that call, so that he can be sure

(Testimony of Henry R. Woltman.)

that the call was correct, etc., we would find out for him that name.

Q. I am speaking, though, of a direct inquiry from a member of the general public, who would present himself to the officers of the telephone company and ask the simple question, "Who [69] is the subscriber to this particular telephone number?"

A. Well, we would ask why he wanted to know.

Q. In other words, a showing must be made?

A. Yes, for the reason I explained, that we feel that the listing is part of the customer's service, and we agreed with him as to how it shall appear, and so we don't give out information just to anybody's off-hand request, because it might be to the customer's disadvantage.

Q. By company rules, must the manager of that particular division be seen before a ruling can be had?

A. Well, I did not mean a company rule in that connection. We don't have hard and fast rules on these things. We attempt to deal in a reasonable manner with a reasonable request. Our managers in our different offices are highly trained men.

Q. The Pacific Telephone & Telegraph Company is the only telephone company furnishing service in this particular metropolitan area, is that correct?

A. That is correct.

Mr. KORTE: Q. That disclosure, Mr. Woltman, just to make it clear, would not be made in the case of the unpublished number that you mentioned?

A. No.

HOWARD L. VAN ORDEN,

a witness called on behalf of plaintiff testified substantially as follows:

Direct Examination

I am in the printing business, located at 234 First Street, San Francisco. My concern printed the telephone directory for May, 1935, for San Francisco and also the Oakland, Alameda, Berkeley and San Leandro directory. I recognize plaintiff's [70] Exhibits 1 and 2 as the directories printed by my concern.

(Following discussion it was stipulated by counsel for the defendants that the directory was entirely printed, and the type set and the plates in each of those directories made and the printing done entirely within the United States as called for by the statute.)

The statement "Copyright 1935 by The Pacific Telephone and Telegraph Company" was printed on every copy of the directory, of the May, 1935, book, and the plate from which the page was printed contained that notation. This is true of both the San Francisco and Oakland directories.

(Following discussion it was stipulated by counsel for the defendants that no question is raised as to the validity of plaintiff's copyright with respect to the work of setting the type and making the plates and printing the directory and binding it, as required by the statute, within the confines of the United States, nor as of those formalities or mechanics through which you would

(Testimony of Howard L. Van Orden.)

have to go in order to develop and distribute, reserving a question as to the copy right-ability of the directory as a whole.)

(There was offered, received and deemed read into evidence plaintiff's Exhibits 7 and 8, consisting, respectively, of 58 certificates of copyrights each for the San Francisco and Oakland telephone directories issued by plaintiff beginning with October, 1908 and ending with the May, 1935 issue. By stipulation photostats were substituted for the originals.)

(Following discussion it was stipulated by counsel for the defendants that the plaintiff had published telephone directories prior to the effective date of the Public Utilities Act and one at least as early as the year 1880.)

(There was offered and received into evidence, under stipulation by the defendants, plaintiff's Exhibit 9, consisting of a photostatic copy of an application for telephone service.) [71]

PERCY R. CLEMENTS,

called on behalf of plaintiff testified substantially as follows:

Direct Examination

I am manuscript supervisor for The Pacific Telephone and Telegraph Company, in Mr. Woltman's office. I have been doing that work for approximately twelve years. I am familiar with the nu-

(Testimony of Percy R. Clements.)

merical directory for the San Francisco Exchange and the Oakland Exchange put out by the defendants. I am also familiar with the telephone company's directory for the San Francisco Exchange and the Oakland Exchange. I have examined the telephone company's directories for May, 1935 in both those exchanges for errors. I have prepared a list of these errors and compared them with the numerical directory. The errors appearing in the numerical directory are identically the same as appear in the Pacific Telephone & Telegraph Company's directory. The list I prepared contains all the known errors in the telephone directory. I am showing you a list for the East Bay, Oakland directory, marked Exhibit A. The first of the three marked off columns consist in the alphabetical errors in our directory, the Bay Counties Directory. "P. 21." after each name in parentheses, refer to the page number in our directory. The first page is 21 and the last listing "White; Cyrus E." is page 238. The second column contains the East Bay alphabetical errors in the numerical telephone directory. The third column indicates what the error consists of. For example, "Benjamin, J.K." should not have appeared in our directory. It did appear, and also in the numerical directory. It was an error on our part. A human failure is about the only way I can answer that. We had no telephone service for that listing.

(Testimony of Percy R. Clements.)

(There was offered and received in evidence plaintiff's Exhibit 10, consisting of a list of errors in the plaintiff's Oakland directory.) [72]

We have 33 errors listed in the East Bay. I have prepared a like list for San Francisco, marked Exhibit B. The same procedure was followed, listing the errors in the directory in the first column and the manner in which it is listed in the numerical directory in the second column, and in the third column as it should be or should not be. There are 43 errors in the list. That is the total amount of errors known to our department.

(There was offered and received into evidence plaintiff's Exhibit 11, consisting of a list of errors in plaintiff's San Francisco Directory.)

I have compared the San Francisco directory for "disconnects" made between the time the directory listings closed on March 25, 1935 and the time the directory was issued. I have listed those "disconnects". There are 97. This is not all of the "disconnects", this being a spot check. I have examined the numerical directory for those disconnects. This list of disconnects appears in the telephone directory and they also appear in the numerical directory. This list is in three columns; the first column contains the telephone prefix and number, the second column the name, and the third column the date that the telephone service was disconnected. I have personally compared this list against the numerical directory. I found that these names appeared in

(Testimony of Percy R. Clements.)

the numerical directory. When the service is disconnected we ordinarily remove the listing. As many listings and disconnects come in after the directory was closed that would be taken care of in the subsequent directory. The 97 telephone numbers and names listed in this sheet are telephone numbers and names of subscribers to the telephone service who were disconnected in San Francisco between March 25 and April 30, 1935, and there was no telephone service at those names or numbers. I have done the same thing for the Oakland directory. I checked 50. I checked those 50 listings [73] against the numerical directory and found them in there. They were also found in the alphabetical section of the Oakland directory, put out by the telephone company and they are listed in three columns as in the case of San Francisco.

(Following discussion it was stipulated by counsel for the defendants that the defendants used the numbers and names which appear in the A to Z sections of plaintiff's directories, (not including classified) in the compilation of defendant's numerical telephone directories and that no other source was used.)

(There was offered and received into evidence plaintiff's Exhibit 12, consisting of an alphabetical list of errors and omissions of the May, 1935 directories, plaintiff's exhibits 1 and 2. On behalf of the defendants an objection was offered in so far as the list contained new numbers and sustained as immaterial. Following discussion it was stipu-

(Testimony of Albert C. Calendar.)

lated that the "disconnects" be understood as read in evidence.)

(Following discussion it was stipulated by counsel for the defendants that none of the unpublished numbers are listed in the Numerical Directories.)

ALBERT C. CALENDAR

A witness called by the plaintiff testified substantially as follows:

Direct Examination

(Following discussion it was stipulated by counsel for the defendants that the witness had three conversations with the Defendant Fred S. Leon, who admitted that the sole source the information for defendants' Numerical Directories (Plaintiff's Exhibits 5 and 6) was plaintiff's telephone directories (Plaintiff's Exhibits 1 and 2.)

I am district manager of the Commercial department [74] of The Pacific Telephone and Telegraph Company. My office is at 444 Bush. That is known as the business office. I am familiar with the practice of the telephone company in giving out the name and address of a subscriber when merely the number is furnished. If a subscriber should call on the information service, that is, the operators, they give them the telephone number of information. The operators, not having the name and address, or that particular part of the organiza-

(Testimony of Albert C. Calendar.)

tion, they so inform the customer that "I am sorry, we haven't that information." If a customer of ours would call the business office and say, "I have the telephone number and I would like to have the name and address", it would be given to him without restriction, except if the number was non-published. The reason for keeping different records for the business office and the information bureau is because our accounts are kept by telephone number, and services are referred to from the standpoint of the issuance of orders by telephone number. In the information bureau the records are kept alphabetically, and also by street address, but not by telephone number.

Cross-Examination

Mr. SHAPRO: Q. Do I understand you to say that if I have any phone number other than one that is listed on your records, and I call the business office of the telephone company right now and say, "I have the number Douglas 0666, and I would like the name and address of that party." Would that information be given me without any further ado, or any more questions than that?

A. That is right.

Q. That is correct? Has that been in force at all times?

A. Well, it has been in force, I guess, for about four years, and it was put in force on the theory that if somebody wanted to get that information and took the time to go through the whole book he could get it. [75]

(Testimony of Albert C. Calendar.)

A. Now, Mr. Calendar, if as the fact is, the previous witness this morning directly testified that in order to procure the information that I just described relative to the name and address of a subscriber with a particular listing in the telephone book, and could give no reason which was satisfactory to the Telephone Company, that the information would not be given, he was in error?

A. He was.

Q. He was in error. Is there any particular department, Mr. Calendar, in the business office, or any particular individual or individuals to whom such requests for information would be directed?

A. No. As the calls come in, you call Garfield 9000, that is our main switchboard, and ask for our business office. The operator would ask you on our Garfield 9000 board, we call it the private branch exchange attendant, "What is your telephone number?" In that way she could transfer the call to the party who would handle that particular part of the service.

Q. The identity of that exchange would be the identity of the exchange regarding which information was sought by the caller?

A. Right. The party that would respond to the call would be immediately the party that would have those services, or have the records appertaining to the service of the particular customer making the inquiry, and he would say, "I have a certain telephone number, and I would like to have the

(Testimony of Albert C. Calendar.)

name and address", and would be given that without any restriction.

The COURT: Would that apply to either the San Francisco or Oakland offices?

A. The same thing would apply in Oakland, too. Not for a San Francisco number, though. If you called Oakland they would [76] refer you to San Francisco, because the records are in San Francisco. If you wanted an Oakland number, if you called the Oakland business office for an Oakland number, you would get what we call "service representatives". That is their official title.

The COURT: Q. You could get the same service in Oakland as you could get in San Francisco.

A. Yes.

Mr. SHAPRO: Q. Now, Mr. Calendar, what sort of identification does the party, the caller, have to give of himself in order to procure that information, if any?

A. Well, no. The representative might ask him, "What is your telephone number?—because we keep a record of all contracts that we have in the business office.

The COURT: Suppose he said, "I have no telephone"?

A. We would give it to him anyhow. There is no restriction, your Honor.

Mr. SHAPRO: No restriction at all, and no questions asked or reasons asked before the information is given?

(Testimony of Albert C. Calendar.)

A. If the employee is carrying out instructions there wouldn't be.

Q. Well, we assume your employees do.

A. Yes.

Q. That has been your practice for the past four years, has it?

A. I would say about four or five years.

Q. Do you know if any information or publicity has been given by the telephone company to its subscribers of the availability of such information?

A. There has been no publicity given to that.

Mr. SHAPRO: None at all. That is all. [77]

Redirect Examination

By Mr. KORTE:

Mr. KORTE: Q. Mr. Calendar, is it a practice the telephone company desires?

A. We feel that if somebody wants that information, why, they are entitled to it, and we are under no obligation to withhold that information.

Q. Well, do you encourage the practice of making such inquiries?

A. No. It is there if they want it, and they ask for it.

I had conversations with Mr. Leon concerning the issuance of his directory prior to the time the San Francisco Numerical Directory was issued by him. I believe three times. The first one took place

(Testimony of Albert C. Calendar.)

at his residence on about the 3500 block, California Street. Mrs. Leon, Mr. Leon and I were present.

(Following discussion it was stipulated by counsel for the defendants that prior to issuance of the numerical directories defendants were advised by the plaintiff that it stood on its copyrights and did not want them to issue the said numerical directories because of the copyrights.)

I consider that the defendants are injuring the telephone directory in this way. In the compilation of a telephone directory it is a painstaking work to prevent inaccuracies, and we have facilities set up for many years, experience, etc., and every precaution that is absolutely humanly possible is taken to prevent inaccuracies, and it was my opinion that the defendant was not in the same position to publish a book, a directory, that would be free of inaccuracies as our book would be. That was one of the reasons. That injures our company in this manner, that wrong numbers on calls—I would have to go a little further and qualify my remark by saying [78] that in the use of this numerical directory for verification purposes, as I understand the book is intended for use, the customer might transcribe in a particular way those numbers onto a card, or something of that kind, and might refer to them later on in placing calls, and if he transcribed a call inaccurately, that transcribed number would contain inaccuracies, or if the number had been changed through the normal turnover in every business, as was brought up this morning, he would

(Testimony of Albert C. Calendar.)

have a wrong transcribed number, and if he was to place a call for that particular number it would cause annoyance to the customers, our customers as well as to the company by virtue of the fact that that call had to be directed to the intercepting operator, and we would have to give that information as to what the right number was. We are willing to do that.

Then there is the customer objection. That is, there is a subscriber's objection to calling a wrong number, to *be being* called by somebody when they might call the number, dial that number, they might use it after that number had been reassigned to some other customer.

The customer would be getting these calls, and would call us and say he was being called, he was connected by mistake with our equipment. In fact, he would question the party that would be calling and say, "What number did you call?" And he would say, "I called a certain number." Now, that would be the complaining customer's number, and he would say, "Well, this is my number." "Well, I dialed that number, and I understood that number belonged to somebody else", and the party would then call the telephone company who received the call and he would make complaint that this party dialed the number by mistake, if he was dialing, that the party was dialing that number after it has been reassigned, and it had been dialed by mistake. [79]

(Testimony of Albert C. Calendar.)

The subscriber would be injured. The company would be indirectly injured because we are more or less held responsible, because the customer would not be able to differentiate whose fault it was that he was receiving these wrong numbers.

Numerical directories are not new, although to my knowledge the only numerical directory I know of in San Francisco was one that was put out by a party, I think, by the name of Coleman, many years ago. It was a convenience in so far as it contained accurate information, your Honor. We had quite a lot of trouble with that, because customers would use that directory and make notes, and some of the billheads, I might illustrate the difficulty we encountered—if a customer will put his telephone number on a billhead or a business card, and they get into circulation, and later on that customer's number is changed, and the original number may have been reassigned, the party who received the number, the second party who received the number, would still be getting calls for the party who originally had the number. He wouldn't know but that the telephone equipment was faulty in making the connection and giving him wrong connections, and he would call us and want to know why he was getting these calls by mistake.

The numerical directory is a convenience if it contains accurate information. As a matter of fact, we say it is a convenience, because we give out the information, ourselves. Our main objection to it is because of the inconvenience it may cause the

(Testimony of Albert C. Calendar.)

subscribers by reason of wrong numbers being dialed. And at the same time it is an expense to the telephone company, as well, as it causes us annoyance in receiving complaints from a lot of customers who receive those wrong numbers, because they hold us responsible for faulty action of equipment. They don't hold us responsible for incorrect dialing, but a great many customers won't quizz the party as to what number he called. For instance, if the number was [80] dialed for Brown, and if the Jones number—a party would be calling on the 'phone and want to talk to Mr. Brown. They would say, "This is not Mr. Brown, who do you want". The other party would say "I want Mr. Brown." "Mr. Brown is not here, this is Mr. Jones", and the party would hang up, and he wouldn't have the opportunity to find out what number he did dial. They would call on us and think they got that wrong number.

We do have complaint, though, because people being called on a wrong number, they don't know that the party had dialed their number. As a matter of fact, if they were to question the party that was dialing, the calling party realizing he had made a mistake in calling the number, he would hang up before the party would get an opportunity to determine from him whether he dialed his number. That would cause the party that was called to assume in many cases that the telephone company's equipment was functioning in a faulty manner, and

(Testimony of Albert C. Calendar.)

he would call and complain to us, and I have gone to this extreme of asking these customers to keep a record of those numbers that were being dialed and getting the numbers, getting in touch with other parties, and determine from them just what it was they were dialing, what number was dialed by mistake, and I found in many cases it was due to the fact they got the number off a card, or a billhead, after the number had been reassigned to another customer. We would not be worried about any calls of that kind that would come in, about someone dialing the wrong number.

The annoyance that I have described to the Court, that would result from a number having been changed and relisted under another name, would result anyway from the fact the numerical directory would still retain under that number the same number belonging to the real subscriber provided they did not get out another book. If I may qualify that again. Inasmuch as the directory is sold, as they brought out this morning, it is not [81] obligatory upon the party who bought it to turn it back. That would be a permanent circulation. Assuming the numerical telephone directory was compiled from information derived solely from the May, 1935 book, the very same errors which would cause the annoyance I have described to the Court would appear in our own telephone book. In other words, until a new book was issued the May, 1935 book would be the only official book as far as

(Testimony of Albert C. Calendar.)

we are concerned. If Jane Smith had Douglas 1234 as her number at the time the May, 1935 book was issued, as far as anybody using our book was concerned they would know Jane Smith had Douglas 1234. If they did not use the numerical telephone book but on the other hand called the number, itself, from any other source, such as I have described, the letterhead, or billhead, they would receive the information I have just described from the intercepting operator, the very same as would a person who called that number, having used the numerical telephone directory to get it. During the life of a particular directory the annoyance to the subscriber, or the telephone company through its subscribers, by reason of the customer using a disconnect, or change or error, as far as the company itself is concerned, would require the same service of an intercepting operator. I pointed out to Mr. Leon that he was not in a position to bring about the efficient compilation as we are, by virtue of our past experience in the business. I told him that his inaccuracies in my opinion, would be greater than ours because of the precautions we set up to prevent inaccuracies. I do not know what the facts are with respect to the comparison of our book and the numerical telephone directory for the number of inaccuracies.

Calls to numbers appearing in our directory or in the defendant's directory, since reassigned, would go over to the intercepting operator in both instances, and then the intercepting operator would

(Testimony of Albert C. Calendar.)

give out the information, but that is an expensive [82] method of operation from our standpoint. If we can confine the intercepting service to a minimum number of calls it would save us quite a bit in expense. It is quite an expensive service.

Supposing the number Garfield 6133 to have been originally assigned to John Doe and then during the life of the directory, and after the numerical directory had copied that number, that number was assigned to Richard Roe and Richard Roe was called by someone at the number Garfield 6133, the numerical directory would give no information about that number. They would still give the information as to John Doe having that number. It would give the same information that our directory would give during the life of our directory, but the subsequent directory would be corrected. In the reassignment or disconnecting of numbers, we don't re-assign them until about the end of the life of the existing directory, and only do we do that where there is a scarcity of facilities.

(Following discussion it was admitted by counsel for the plaintiff that in so far as it is accurate and kept up to date, a numerical telephone directory is a useful publication.)

(There was offered and received in evidence plaintiff's Exhibit 13, consisting of a certified copy of the rules and regulations on file with the Railroad Commission.)

There was an offer on behalf of the plaintiff to call George C. Martin to testify substantially as follows:

He is employed by the telephone company as a salesman at Sacramento. On November 27, 1935, he was employed in San Francisco. On that date, which was two days after the issuance of the preliminary injunction here, he called at the office of Mr. Leon in the Monadnock Building, about 2:45 P. M. to buy one of the directories. Mrs. Leon waited on him and attempted to sell him both the San Francisco and Oakland editions. When he concluded to [83] buy only the San Francisco book he asked for a receipt, and when he asked for that Mr. Leon called from the adjoining office and told him to date the receipt Monday, the 25th. When he objected to the date not being the actual date of the sale, it was explained to him that they were having trouble with the telephone company not wanting them to put out the numerical directory, and for their own reasons would rather have the date as made out on the receipted bill.

On behalf of the defendants objection as to this offer was made on the grounds it was incompetent, irrelevant and immaterial, and not embraced within the issues of the case, and has no bearing on the case by reason of the fact that if the evidence as offered is true it was not a violation of any order of this court, because it had not as yet been served.

The court's ruling was as follows: Objection sustained, with an exception allowed to the plaintiff as requested.

(There was offered in evidence on behalf of the plaintiff a bill of sale, dated Nov. 25, 1935, signed by D. Leon. The defendants offered the same objection as to the offered testimony of George C. Martin. The court's ruling was as follows: Objection sustained, with an exception allowed to plaintiff as requested. It was further ordered that the bill of sale be marked "Plaintiff's Exhibit 14 for identification".)

It was stipulated by counsel for the defendants that were Silvia Decter, a former employee of the defendant, Fred S. Leon, in the work of compiling his directory, called to the stand her testimony would be substantially as follows:

That the manner of compiling the numerical directory was to take out of the May issue the alphabetical section, out of the May issue of the telephone company's telephone directory, cut the columns, and then cut the listings out and paste them on loose leaf [84] binder sheets in numerical order; that the listings in the telephone directory were pasted in numerical order on those binder sheets, according to the exchange classification. They would take one sheet of the telephone directory and they would rule out the numbers and listings on the back side of that sheet with a pencil, and then clip out the listing, and they would place the listings in boxes according to the exchange telephone number of that particular listing. For example, my telephone number would be "Norbert Korte, Garfield 6133." That would be cut out, just that listing, and put in a box labeled "Garfield."

Then when all the Garfield numbers were in that box they would take them out of the box and paste them on this loose leaf binder sheet in numerical order, so that my listing would come, "Norbert Korte, Garfield"—immediately after 6132 and immediately before 6134, if there was such a listing for somebody else. After those looseleaf binder sheets were made up in that numerical order for all the alphabetical sections of the San Francisco directory and the Oakland directory, then they would type lists of those listings, but in making or doing the typing they would reverse the order of the listing, and leave out the address, so that my number would appear on their typed list as "Garfield 6133, Norbert Korte", no address. Those sheets were typed up in columns, three columns of 133 listings to the column so that there were 999 listings on each sheet. They were sent to the printer and photographed and then reduced, and there plates were made.

It was further stipulated by counsel for the defendants that the little clippings pasted on the sample sheet were cut out of the telephone alphabetical section; that this was done for every listing in the telephone book from the Numerical Directory; that when they proof read the typed sheets from which those plates were made on each typed sheet the listing was reversed so that the telephone number came first and the name second; that they proof read [85] them against these pasted sheets, to see that they were correct; and made corrections against these pasted sheets; that they made no corrections other than those shown on these pasted

sheets; that the sole means of proof reading and correcting the type written sheets from which the plates were made was the original source of the information, namely, the plaintiff's telephone book; that they did not verify any of the listing by approaching the subscribers with the pasted sheets. That Miss Decter was proofreader.

(There was offered and received into evidence plaintiff's Exhibit 15, consisting of a sample of one of the sheets referred to in the stipulated testimony of the witness Silvia Decter.)

It was stipulated by counsel for the defendants that if Miss Wnola Mosier were called as a witness on behalf of the plaintiff she would testify substantially as follows:

That she was employed by the defendant, Fred S. Leon, in the compilation of the Numerical Directory; that she typed rather than proof read; that she was one of the persons who typed up the numerical sheets from the pasted sheets.

Motion was made for dismissal of the complaint as to the party Dagmar Leon, joined here as a partner of Fred S. Leon, doing business as Numerical Directory Co., and who filed an answer denying such partnership, on the theory that the plaintiff had not offered any evidence, whatsoever, in support of that particular allegation.

Whereupon counsel for plaintiff requested permission of the court to reopen plaintiff's case to offer the evidence. The court's ruling was as follows: That the case be reopened.

There was offered and received into evidence plaintiff's Exhibit 16, consisting of a letter addressed to Mr. A. C. Calender, Dist. Mgr., Tel. & Tel. Co., San Francisco, California, signed by Dagmar Leon. On behalf of the defendant, Fred S. Leon, an [86] objection was made to the introduction of the letter on the ground that no foundation had been laid. The objection was overruled by the court.

(Following discussion it was stipulated by counsel for defendants that the witness Silvia Decter and Wynola Mosier would also testify that Mrs. Leon worked on the compilation of the directory.)

Whereupon the motion for dismissal of the complaint as to the defendant Dagmar Leon was renewed. The court's ruling was as follows: Motion denied, with an exception allowed as requested.

FRED S. LEON

One of the defendants, called as a witness in behalf of the defendants, testified substantially as follows:

My business is the publication of the Numerical Telephone Directory. It is owned by me. To my knowledge I have no partners in that business. My wife has cooperated with the production of the book, and that is her relation to me. She is my wife. That is my name on the first page of plaintiff's Exhibit 6. The purpose of inserting it there was to

(Testimony of Fred S. Leon.)

show the ownership of that business, the responsibility for the compiling. The name appeared in precisely that manner in all of the Numerical Telephone Directories issued for Oakland. In the Numerical Telephone Directory for San Francisco the name is on the reverse side of the first page under the copyright notice.

Cross-Examination

I did not mean that my name appears with the Numerical Telephone Directory itself but it appears down in the copyright notice. That is the only place in which it appears. The copyright notice placed on the reverse side of the first page was in all the San Francisco directories. I also printed an excerpt from the copy- [87] right law. Mrs. Leon worked right along with me in compiling this directory. She did not work right along with me in selling it. She worked in my office in the Monadnock Building where it was sold. She did not make sales unless somebody would drop in and buy a book over the counter which was not the usual procedure. She did sell some over the counter. More than one. In compiling my directory I did not consult any individual subscriber, telephone subscriber listed to get his permission. There are possibly certain errors that appear in both of my numerical directories. We have no facilities of our own by which we could give the purchaser of either of our books the correct information where the listings are erroneous.

(Testimony of Fred S. Leon.)

Redirect Examination

I have recorded a certificate of doing business under a fictitious name in support of my claim to the proprietorship as an individual of the business conducted under the name and style of Numerical Directory. It is recorded in the City and County of San Francisco.

WILLIAM E. CHURCH

A witness, called on behalf of the defendants, testified substantially as follows:

I have charge of telephone facilities for the Shell Oil Company in Los Angeles and points along the Pacific Coast, where we have our own facilities. I have held that position for twelve years I believe, approximately twelve years. I have charge of our privately owned telephone system, and also check all telephone bills, long distance and exchange bills on matters pertaining to telephone expense. My duties also include supervision of the mechanical facilities that are provided as a service to my employer. I have seen two or three numerical directories; four or five, I suppose. I have seen the Oakland Directory and the San Francisco Directory, [88] the Santa Barbara Directory and one at Phoenix, Arizona, and I believe one at San Jose. I have seen a copy of plaintiff's Exhibit 6. In my opinion as a telephone man the directory I hold in my hand has a very useful purpose. The outstanding purpose that I see for this is that most any busi-

(Testimony of William E. Church.)

ness office, in my experience, gets quite a number of calls when you are out of your office, to be called back. They ask you to call a certain telephone number and quite often I have found as many as five or six such calls on my desk after being out for an hour or so, and with this directory I could check those calls and see whether it was some salesman or someone seeking employment, and ascertain approximately what their business was and whether it was necessary to make the return call.

In Los Angeles we have measured service, and each call costs us 3½ cents. Naturally, if we make those eight or ten calls it would be over twenty or thirty cents, and in a large organization that might be quite an item, as well as indirect reasons why you might not wish to contact a certain party at a given time when you wish to assimilate some information that you should know in advance, and that would be discussed during that conversation. I should say the checking use of the numerical telephone directory would be its prime use. I can hardly see how you could turn to this directory to place a telephone call. Obviously, you would have quite a time if you wanted to look up John Doe, looking through all the book to find that John Doe's number was in this directory. It would be a parallel case to taking the ordinary telephone directory and trying to find out who a certain number belonged to. No, I don't think the numerical telephone directory would be put to the same use or duplicate in any sense the utility of the alphabetical tele-

(Testimony of William E. Church.)

phone directory. It is the practice in the Shell Oil Company when a call is received [89] at our main switch board and the person called is not at his particular desk or location, if the party has a secretary, the secretary takes the call in the usual way, and our operators have to ring him two or three times, and probably get on the line and say the party is out, and ask if there is any message to be left, or to have him call back. A memorandum is thereafter conveyed from the operator to the location or desk of the party for whom the call was intended. The party leaves a number to be called back, and naturally they transfer that information to the party who was desired. It seems obvious to me, that a Numerical Telephone Directory would have utility for the purpose of checking back on such calls, if it was put to that use.

Cross-Examination

The telephone system of the Shell Oil Company is a private system. We do not publish a directory to the public for that. The public has not access to it. I check, as well as supervise, our own facilities. I check the long distance calls, exchange calls, and other telephone expense which is paid to the telephone company in our entire southern division. That is as a subscriber to the telephone service. Any subscriber could do that. My testimony is that the Numerical Directory is of an assistance there in placing these calls for which numbers have been

(Testimony of William E. Church.)
left at our office. We could place the call without the Numerical Telephone Directory. It is of no assistance to us in completing that operation.

MRS. DAGMAR LEON

One of the defendants, called in behalf of defendants, testified substantially as follows:

I am the wife of the other defendant in this action, Fred S. Leon. I had no connection whatsoever with the Oakland Directory until we started with the compiling. I helped compile it [90] but I had nothing to do with any other part except the compiling. It is true I helped in the office in the Monadnock Building for some days, but not all the time. I had nothing to do with the selling of the Oakland book. I had nothing to do with the management of the business nor the giving of any directions respecting the manner in which the business of the Numerical Telephone Directory, either in Oakland or San Francisco, was conducted. It was definitely understood I was to have nothing to do except with the compiling. I had such an understanding with my husband. To my knowledge, no one other than my husband, Fred Leon, had any direction or control over the affairs of the business of the numerical directory either in San Francisco or Oakland.

Cross-Examination

By "compiling" I mean preparing the book for print. I had something to do with the Oakland and

(Testimony of Mrs. Dagmar Leon.)

San Francisco directories in that connection. Yes, I made some sales, but I had nothing to do with the sales department at all. Yes, I made some sales, when they just happened to come into the office, I sold the books. Those sales I did make were outright. That is the way all of the books were disposed of, for a stipulated price.

PERCY C. CLEMENTS,

recalled in rebuttal on behalf of plaintiff, testified substantially as follows:

I made a spot check of certain listings in the numerical directory for San Francisco against the Alpha section of the telephone directory of May, 1935, for San Francisco. I don't recall off-hand how many listings I did check. I think I have the figure down there. I prepared a list. Some I checked and some were checked under my supervision. This is the list that I prepared. The statement on the first page of that list, "Comparison of 1000 listings taken from the San Francisco Alpha Section March [91] 1935 Bay Counties Directory with 1935-6 San Francisco Numerical Telephone Directory" is incorrect it should be May, 1935 directory. Refreshing my recollection from that list, I checked 1000 listings in the numerical directory against the Alpha section of the San Francisco Telephone Directory of May, 1935. I

(Testimony of Percy C. Clements.)

found errors to the extent of approximately 14%. In other words, about 140. The errors consisted of some omissions, some incorrect spelling, and where there was a little difference in the name. In every case I have indicated the error in the margin of those checks.

(There was offered and received into evidence plaintiff's Exhibit 17, consisting of a list of errors found in a comparison of 1000 listings taken from the San Francisco telephone directory for May, 1935 with the defendants' numerical directory for 1935-6.)

Cross-Examination

The list which has just been introduced in evidence as plaintiff's Exhibit 17 was not the only check that we made of the San Francisco Numerical Directory with our own Alphabetical directory. We made other checks besides that. I could not personally state the percentage of errors found in the other checks, because in our previous Exhibit we had the same errors in our directory as you have in the numerical directory. Plaintiff's Exhibit 17 represents the only errors that occur in the numerical directory as compared with our own Alphabetical directory. I did not make any other or more extensive similar check. I did not check any other letter of the alphabet. We took those 1000 listings from various parts of our book. They were not all under A. Explaining just how we made this check, I took one of the Telephone Company's May, 1935 San Francisco Alpha Directories and I took the

(Testimony of Percy C. Clements.)
outside column just discriminately, pasted them up, and then started the check against your Numerical Directory and our directory. I made the one check, and the result of that check, and the percentage of [92] 14 per cent of errors, is contained in plaintiff's Exhibit 17.

Respectfully submitted:
JAMES M. NAYLOR and
ARTHUR B. SHAPRO
Attorneys for Defendants and Appellants.

Receipt of copy of the foregoing Defendants' Proposed Statement of Evidence is hereby acknowledged this 25 day of September, 1936.

PILLSBURY, MADISON & SUTRO
Attorneys for Plaintiff and Appellee. [93]

It is stipulated and agreed by and between counsel for the above-entitled parties that the foregoing narrative statement of evidence is a full, true and correct statement in narrative and verbatim form of all the testimony produced upon the trial of the above-entitled cause.

JAS. M. NAYLOR
ARTHUR B. SHAPRO
Attorneys for Appellants and Defendants.
PILLSBURY, MADISON & SUTRO
Attorneys for Appellee and Plaintiff.

ORDER APPROVING STATEMENT OF EVIDENCE.

The foregoing Narrative Statement of Evidence is herewith allowed, settled and approved as a full, true and correct statement in narrative and verbatim form of all the testimony produced upon the trial of the above entitled cause.

A. F. ST. SURE
United States District Judge.

San Francisco, California,
Dated: Nov. 27th, 1936. [94]

[Endorsed]: Filed Aug 3 1936.

[Title of Court and Cause.]

DEFENDANTS' PETITION FOR APPEAL FROM DECREE GRANTING PERMANENT INJUNCTION.

To the Hon. A. F. St. Sure, Judge of the United States District Court for the Northern District of California:

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co., defendants above-named, and each of [95] them, feeling themselves aggrieved by the final order, judgment and decree of the above-entitled Court granting to the above-named plaintiff a permanent injunction as prayed for in the Bill of Complaint on file herein, which said final order, judgment and decree was made and entered herein on the 22nd day of May,

1936, do hereby petition for an appeal from the said order, judgment and Decree Granting Permanent Injunction to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons and upon each and all of the grounds set forth in the Assignments of Error filed herewith, and pray that their appeal may be allowed, and a citation issued, directed to said appellee, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, commanding it to appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice in the premises, and that a transcript of the record, proceedings, and evidence in the above-entitled action, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit; or for such other, further and different order or relief, as to this Honorable Court may seem just in the premises.

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co.,
Petitioners,

By ARTHUR P. SHAPRO
Their Attorney

JAMES M. NAYLOR and
ARTHUR P. SHAPRO
Attorneys for Petitioners,
Defendants and Appellants.

[96]

The foregoing appeal is hereby allowed upon the filing herein by said petitioners of a cost bond, conditioned as required by Section 1000 of the Revised Statutes of the United States, with sufficient sureties to be approved by this Court, in the sum of $250.00.

Dated at San Francisco, in said District, this 3rd day of August, 1936.

A. F. ST. SURE
U. S. District Judge. [97]

[Endorsed]: Filed Aug 3 1936.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Now come FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Company, defendants above named, and assign the following and each of them as errors on which they will rely upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final Order, Judgment and Decree of the above-entitled Court, granting permanent injunction, made and entered herein on May 22nd, 1936: [98]

1. That the said Order, Judgment and Decree of said United States District Court for the Northern District of California, is not supported by the evidence adduced herein.

2. That the said Order, Judgment and Decree of said United States District Court for the North-

ern District of California is contrary to the evidence adduced herein.

3. That the Findings of Fact herein, upon which said Order, Judgment and Decree of said United States District Court for the Northern District of California is based, are contrary to the evdence adduced herein.

4. That the evidence adduced herein is insufficient to support any or all of the following findings which were adopted by said United States District Court for the Northern District of California in the making of its said Order, Judgment and Decree, namely:

(a) "The collection, editing, compilation, classification, arrangement, preparation of the material in said directories and the publication of said directories involved a large amount of detail and required great effort, discretion, judgment, painstaking care, skill, labor, accuracy, experience and authorship of high order. Said telephone directories were the sole and exclusive property of plaintiff, and plaintiff possessed the sole and exclusive literary and other rights therein, including the right to copy. Said directories constitute new and original literary works, and are the proper subject of copyright. Said copyrights are existing and plaintiff is the sole and exclusive owner, author and proprietor thereof.", as set forth in paragraph V of said Findings.

(b) "The copyright of plaintiff's said May, 1935, directories is valid.", as set forth in paragraph VI of said Findings.

(c) "Defendants copied and transferred into said [99] numerical directories, without the consent or license of plaintiff and in violation of plaintiff's rights under its copyrights, valuable and material portions of plaintiff's copyrighted May, 1935, directories, and thus saved themselves the expenditure of a large amount of time, labor and money. Defendants took and appropriated to their own use the entire portion of the alphabetical section of plaintiff's May, 1935, directories, and did not obtain any of the information contained in their numerical drectories from original sources or from any source other than plaintiff's said directories. Defendants' said copying of plaintiff's said directories was deliberate and premeditated and constituted an infringement of plaintiff's said directories.", as set forth in Paragraph VII of said Findings.

(d) "Defendants have infringed plaintiff's copyrights of its May, 1935, directories", as set forth in paragraph VIII of said Findings.

5. That the said order of said United States District Court for the Northern District of California in adopting its findings of fact, upon which said Order, Judgment and Decree is based, failed to take into consideration the following proposed amendments and additions thereto regularly submitted to said Court on behalf of the Defendants herein, namely:

(a) An amendment to Paragraph V of the findings of fact consisting in the deletion therefrom of

the first two sentences, beginning "The collection, editing . . .", in line 1, and ending ". . . right to copy.", in line 9 thereof.

(b) An amendment to the findings of fact consisting of the deletion of the whole of Paragraph VIII and substitution of the following: "The use of the material within Plaintiff's copyrighted alphabetical telephone directories for 1935 by the Defendants in the compiling and publishing of their numerical [100] telephone directories was an unfair use, and therefore an infringement thereof."

6. That the conclusions of law herein upon which said Order, Judgment and Decree of said United States District Court for the Northern District of California is based, are not supported by and are contrary to the findings of fact entered herein and to the evidence upon which same were based.

7. That the said Order, Judgment and Decree of said United States District Court for the Northern District of California denied defendants the relief prayed for in their answers to the Bill of Complaint herein, namely, the dismissal of the Bill of Complaint with costs and attorneys' fees to said defendants.

8. The Orders of said Court in overruling each and every of defendants' objections and sustaining each and every of plaintiff's objections upon the trial of the cause herein.

9. That the Order of said Court denying the motion of the defendant, Dagmar Leon, to dismiss the Bill of Complaint as against her was not sup-

ported by and was contrary to the evidence adduced herein, to which said Order timely exception was noted by said defendant.

10. That the Order of said Court, entered November 25, 1935, adjudging and decreeing that a preliminary injunction issue against the defendants herein was contrary to law and not supported by the evidence upon which same was predicated.

NOW, THEREFORE, in order that the foregoing assignments may be and appear on record, defendants present the same and pray that said assignments may be filed and that such disposition may be made thereof as is in accordance with the laws of the United States in that behalf made and provided; and pray that the said Final Order, Judgment and Decree, granting permanent injunction, herein be reversed and that the District Court of [101] the United States for the Northern District of California be directed to enter a decree in favor of defendants in accordance with the prayer of their answers to the Bill of Complaint on file herein.

Respectfully submitted,
JAS. M. NAYLOR
ARTHUR P. SHAPRO
Solicitors & Attorneys for
Defendants. [102]

Know All Men by these Presents,

That we, FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co., as principals and AMERICAN EMPLOYERS' INSURANCE COMPANY, a corporation, of 110 Milk Street, Boston, Massachusetts, as Surety, are held and firmly bound unto THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, in the full and just sum of TWO HUNDRED FIFTY AND NO/100 ($250.00) dollars, to be paid to the said THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of August in the year of our Lord One Thousand Nine Hundred and Thirty-six.

WHEREAS, lately at a District Court of the United States for the Northern District of California, in a suit depending in said Court, between THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Plaintiff and FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co., Defendants, a Decree was rendered against the said Defendants and the said Defendants having obtained from said Court an Order Allowing Appeal to reverse the Decree in the aforesaid suit, and a citation directed to the said THE PACIFIC TELEPHONE AND

TELEGRAPH COMPANY, a corporation, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

Now, the condition of the above obligation is such, That if the said FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co., shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

(Signature of Perry acknowledged before Notary Public Aug. 4, 1936)

[Endorsed]: Form of bond and sufficiency of sureties approved.

A. F. ST. SURE,
Judge.

This recognizance shall be deemed and construed to contain the "Express Agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

[Seal] DAGMAR LEON
[Seal] FRED S. LEON
[Seal] AMERICAN EMPLOYERS' INSURANCE COMPANY
By JOHN STONE PERRY
Attorney-in-fact.

[Endorsed]: Filed Aug. 7, 1936. [103]

[Endorsed]: Filed Aug 20 1936.

[Title of Court and Cause.]

STIPULATION ENLARGING PLAINTIFF AND APPELLEE'S TIME TO FILE A COUNTER-PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL FROM DECREE GRANTING PERMANENT INJUNCTION.

It is hereby stipulated and agreed by and between the above noted parties that plaintiff and appellee may have to and including September 1, 1936, within which to file herein its counter-praecipe for transcript of record on appeal from decree granting permanent injunction under equity rule 75, and its time to do so may be so enlarged by order of the above entitled court.

Dated: August 19, 1936.

JAS. M. NAYLOR
ARTHUR P. SHAPRO
Attorneys for Defendants and Appellants.
PILLSBURY, MADISON & SUTRO
Attorneys for Plaintiff and Appellee.

It is so ordered.

Dated: August 20, 1936.

A. F. ST. SURE
Judge of said Court. [104]

[Endorsed]: Filed Aug 31 1936.

[Title of Court and Cause.]

STIPULATION ENLARGING PLAINTIFF AND APPELLEE'S TIME TO FILE A COUNTER-PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL FROM DECREE GRANTING PERMANENT INJUNCTION.

It is hereby stipulated and agreed by and between the above noted parties that plaintiff and appellee may have to and including September 11, 1936, within which to file herein its counter-praecipe for transcript of record on appeal from decree granting permanent injunction under equity rule 75, and its time to do so may be so enlarged by order of the above entitled court.

Dated: August 29, 1936.

JAS. M. NAYLOR
ARTHUR P. SHAPRO
Attorneys for Defendants and Appellants.
PILLSBURY, MADISON & SUTRO
Attorneys for Plaintiff and Appellee.

It is so ordered.

Dated: August 29, 1936.

A. F. ST. SURE
Judge of said Court. [105]

[Endorsed]: Filed Aug 13 1936.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL FROM DECREE GRANTING PERMANENT INJUNCTION.

To WALTER B. MALING, Esq., Clerk of the above-entitled Court:

YOU ARE HEREBY REQUESTED to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal from a decree granting permanent injunction heretofore allowed in the above entitled proceeding, and to include in said transcript the following: [106]

(1) Bill of Complaint.
(2) Order to Show Cause.
(3) Affidavits on Order to Show Cause.
(4) Defendants' Affidavit in reply to Order to Show Cause.
(5) Order Granting Preliminary Injunction.
(6) Answers of Defendants.
(7) Minute Order Denying Motion to Dismiss.
(8) Memorandum of Decision.
(9) Findings of Fact and Conclusions of Law.
(10) Decree Granting Permanent Injunction.
(11) Statement of Evidence as required by Equity Rule 75 as hereafter approved by the above-entitled Court.
(12) Petition for Appeal from Decree Granting Permanent Injunction.

(13) Order Allowing Appeal.
(14) Assignment of Errors thereon.
(15) Bond on Appeal.
(16) Citation thereon.
(17) This Praecipe.
(18) Clerk's Certificate.

Dated this 11th day of August, 1936.

ARTHUR P. SHAPRO
JAS. M. NAYLOR
Attorneys for Defendants and Appellants.

Receipt of a copy of the within praecipe is hereby acknowledged this 12 day of August, 1936.

PILLSBURY, MADISON & SUTRO
Attorneys for Plaintiff and Appellee. [107]

[Endorsed]: Filed Sep 10 1936.

[Title of Court and Cause.]

COUNTER-PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL FROM DECREE GRANTING PERMANENT INJUNCTION.

To Walter B. Maling, Esq., Clerk of the above entitled court:

You are hereby requested, pursuant to the provisions of Equity Rule 75, to incorporate into the transcript of record on the appeal herein, in addi-

tion to the portions of the record indicated by appellants herein by *their* praecipe to be included in the transcript of record herein, the following:

1. Stipulation and order for transmitting original exhibits to appellate court;
2. The following original exhibits, none of which is to be reproduced or printed in said record:
   (a) Plaintiff's Exhibit No. 1, consisting of telephone directory, San Francisco and Bay Counties, May, 1935;
   (b) Plaintiff's Exhibit No. 2, consisting of telephone directory, Oakland, Alameda, Berkeley, San Leandro and Bay Counties, May, 1935;
   (c) Plaintiff's Exhibit No. 3, consisting of manuscript used in compiling directories;
   (d) Plaintiff's Exhibit No. 4, consisting of February 1, 1909, telephone directory;
   (e) Plaintiff's Exhibit No. 5, consisting of numerical telephone directory, 1935-36, for San Francisco and other cities and towns;
   (f) Plaintiff's Exhibit No. 6, consisting of numerical telephone directory, 1935, Oakland, Berkeley, Alameda and San Leandro;
   (g) Plaintiff's Exhibit No. 7, consisting of copyright certificates for issues of plaintiff's San Francisco telephone directory published beginning with Oc-

tober, 1908, and ending with May, 1935, issues;

(h) Plaintiff's Exhibit No. 8, consisting of copyright certificates for issues of plaintiff's Oakland telephone directory published beginning with October, 1908, and ending with May, 1935, issues; [108]

(i) Plaintiff's Exhibit No. 9, consisting of photostatic copy of application for telephone service;

(j) Plaintiff's Exhibit No. 10, consisting of a list of errors appearing in the East Bay telephone directory, marked Exhibit "A";

(k) Plaintiff's Exhibit No. 11, consisting of a list of errors appearing in the San Francisco telephone directory, marked Exhibit "B";

(l) Plaintiff's Exhibit No. 12, consisting of alphabetical list of errors and omissions in the May, 1935, directory;

(m) Plaintiff's Exhibit No. 13, consisting of rules and regulations of the Railroad Commission;

(o) Plaintiff's Exhibit No. 14 for identification, consisting of receipt for purchase of numerical telephone directory;

(p) Plaintiff's Exhibit No. 15, consisting of defendant's work chart in compiling their numerical telephone directory;

(g) Plaintiff's Exhibit No. 16, consisting of a letter from Dagmar Leon to A. C. Calendar, dated 9/27/35;

(r) Plaintiff's Exhibit No. 17, consisting of a comparison of 1,000 listings in plaintiff's San Francisco telephone directory with the same listings in defendants' numerical telephone directory for 1935-36 for San Francisco;

3. Stipulation and order enlarging plaintiff and appellee's time to file a counter-praecipe for transcript of record on appeal from decree granting permanent injunction, dated August 19, 1936, and filed herein August 20, 1936;
4. Stipulation and order enlarging plaintiff and appellee's time to file a counter-praecipe for transcript of record on appeal from decree granting permanent injunction, dated August 29, 1936, and filed herein August 31, 1936;
5. This counter-praecipe.
6. Clerk's certificate.

Dated this 10th day of September, 1936.

PILLSBURY, MADISON & SUTRO
Attorneys for Plaintiff
and Appellee

Receipt of a copy of the within Counter-Praecipe, etc., is hereby admitted this 10th day of Sept. 1936.

JAS. M. NAYLOR
Attorney for Defts. [109]

[Endorsed]: Filed Sep. 10, 1936.

[Title of Court and Cause.]

STIPULATION AND ORDER FOR TRANSMITTING ORIGINAL EXHIBITS TO APPELLATE COURT

It is hereby stipulated and agreed by and between the above named parties and their respective counsel that the original exhibits listed herein shall be withdrawn from the files of the above entitled court, and of the clerk thereof, and by said clerk be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal herein, but none of said exhibits shall be reproduced or printed in said record.

Said original exhibits are to be returned to the files of the above entitled court upon the determination of said appeal by said Circuit Court of Appeals.

The list of said original exhibits is as follows:

1. Plaintiff's Exhibit No. 1, consisting of telephone directory, San Francisco and Bay Counties, May, 1935;

2. Plaintiff's Exhibit No. 2, consisting of telephone directory, Oakland, Alameda, Berkeley, San Leandro and Bay Counties, May, 1935;

3. Plaintiff's Exhibit No. 3, consisting of manuscript used in compiling directories;

4. Plaintiff's Exhibit No. 4, consisting of February 1, 1909, telephone directory;

5. Plaintiff's Exhibit No. 5, consisting of numerical telephone directory, 1935-36, for San Francisco and other cities and towns;

6. Plaintiff's Exhibit No. 6, consisting of numerical telephone directory, 1935, Oakland, Berkeley, Alameda and San Leandro;

7. Plaintiff's Exhibit No. 7, consisting of copyright certificates for issues of plaintiff's San Francisco telephone directory published beginning with October, 1908, and ending with May, 1935, issues;

8. Plaintiff's Exhibit No. 8, consisting of copyright certificates for issues of plaintiff's Oakland telephone directory published beginning with October, 1908, and ending with May, 1935, issues;

9. Plaintiff's Exhibit No. 9, consisting of photostatic copy of application for telephone service;

10. Plaintiff's Exhibit No. 10, consisting of a list of errors appearing in the East Bay telephone directory, marked Exhibit "A";

11. Plaintiff's Exhibit No. 11, consisting of a list of errors appearing in the San Francisco telephone directory, marked Exhibit "B";

[110]

12. Plaintiff's Exhibit No. 12, consisting of alphabetical list of errors and omissions in the May, 1935, directory;

13. Plaintiff's Exhibit No. 13, consisting of rules and regulations of the Railroad Commission;

14. Plaintiff's Exhibit No. 14 for identification, consisting of receipt for purchase of numerical telephone directory;

15. Plaintiff's Exhibit No. 15, consisting of defendants' work chart in compiling their numerical telephone directory;

16. Plaintiff's Exhibit No. 16, consisting of a letter from Dagmar Leon to A. C. Calender, dated 9/27/35;

17. Plaintiff's Exhibit No. 17, consisting of a comparison of 1,000 listings in plaintiff's San Francisco telephone directory with the same listings in defendants' numerical telephone directory for 1935-36 for San Francisco.

Dated: September 5th, 1936.

PILLSBURY, MADISON & SUTRO
Attorneys for Plaintiff and Appellee
JAS. M. NAYLOR
ARTHUR P. SHAPRO
Attorneys for Defendants and Appellants

It appearing to the court to be necessary and proper to transmit the above mentioned original exhibits to the United States Circuit Court of Appeals for the Ninth Circuit for its examination and inspection as part of the record on appeal herein, it is hereby ORDERED that the original exhibits listed above shall be withdrawn from the files of the above entitled court, and of the clerk thereof, and by said clerk be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal herein, but none of said exhibits shall be reproduced or printed in said record.

And it is hereby further ORDERED that the original documents so transmitted to said United States Circuit Court of Appeals for the Ninth Circuit are hereby made part of the record on appeal herein, but none of said exhibits shall [111] be reproduced or printed in said record.

Dated: September 10, 1936.

A. F. ST. SURE
Judge of the United States District Court

[112]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 112 pages, numbered from 1 to 112, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause entitled The Pacific Telephone and Telegraph Company, a corp., Plaintiff, vs. Fred S. Leon, et al., Defendants, No. 3943-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $16.40 and that the said amount has been paid to me by the Attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 28th day of November, A. D. 1936.

[Seal] WALTER B. MALING,
Clerk

J. P. WELSH,
Deputy Clerk [113]

United States of America.—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division wherein FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co., are appellants, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge, for the Northern District of California, this 11th day of August, A. D. 1936.

A. F. ST. SURE
United States District Judge

[Endorsed]: Filed Aug. 12, 1936. [114]

[Endorsed]: No. 8397. United States Circuit Court of Appeals for the Ninth Circuit. Fred S. Leon and Dagmar Leon, doing business as Numerical Directory Company, Appellants, vs. The Pacific Telephone and Telegraph Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed, November 30, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Company,

Appellants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

JAS. M. NAYLOR,
Russ Building, San Francisco,
ARTHUR P. SHAPRO,
Russ Building, San Francisco,
Attorneys for Appellants.

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No. 8397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Company,

Appellants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT AS TO JURISDICTION.

This is an appeal from the final order, judgment and decree of the United States District Court for the Northern District of California, Southern Division, (Tr. 50-52), sustaining the validity of appellee's* copyrights in its alphabetical telephone directories and holding them infringed by appellants' numerical telephone directories.

There is no diversity of citizenship since, as the bill of complaint alleges, (Par. I) appellee is a Cali-

*The parties will be designated Appellant and Appellee throughout this brief.

fornia corporation with its principal place of business in the City and County of San Francisco, and (Par. II) appellants are citizens of the United States and inhabitants of the Southern Division of the Northern District of California. (Tr. 2.)

The suit arose under the Copyright Acts of the United States. (Bill of Complaint, Par. III, Tr. 2.)

The bill of complaint also alleges that appellee, as an incident to the telephone and telegraph service it furnishes, has at various intervals prepared and published telephone directories containing the names, addresses and telephone numbers of the listed subscribers to its service (Bill of Complaint, Par. IV, Tr. 2-3); that appellee, as author and proprietor, has complied with the copyright laws of the United States in the printing and publishing of said books (Bill of Complaint, Par. VI, Tr. 4-5); that the Register of Copyrights issued certificates of copyright to appellee (Bill of Complaint, Par. VIII, Tr. 6); and that said books were new and original literary works and the proper subject matter of copyright, and that said copyrights are unexpired, still in full force and effect, and appellee is the sole and exclusive owner thereof. (Bill of Complaint, Par. X, Tr. 7.)

The charge of infringement is contained in Par. XI of the bill of complaint. (Tr. 7-8.)

The District Courts of the United States have original jurisdiction of suits arising under the copyright statutes.

> "The District Courts shall have original jurisdiction as follows:

(7) All suits at law or in equity arising under the * * * copyright * * * laws."

Judicial Code, sec. 24; 28 U.S.C. 41; R. S. sec. 629.

An appeal may be allowed by a judge of the district court or of the circuit court of appeals.

Judicial Code, sec. 132; U.S.C. title 28, sec. 228.

The Circuit Courts of Appeals have appellate jurisdiction to review by appeal or writ of error final decisions:

"(First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

Judicial Code, sec. 128; U.S.C. title 28, sec. 225.

The appellants' petition for appeal from the final order, judgment and decree of the court below was allowed by the District Court on August 3rd, 1936 (Tr. 103-105) and the bond thereon was approved. (Tr. 110-111.) The citation on appeal (Tr. 123-124) thereafter issued and was filed in this court on November 30, 1936.

STATEMENT OF THE CASE.

This appeal (Assignments of Error 4(a) and (b) and 5(a)) raises the question of whether an alphabetical telephone directory, which is prepared by a telephone company as one of the services to its subscribers and which consists in an alphabetical ar-

rangement of the names of the subscribers, followed by their respective addresses and telephone numbers, coupled with a classified advertising section and directional matter relative to the use of the telephone, may be the subject matter of valid copyright under the Copyright Acts of 1909.

The appeal (Assignment of Errors 4(c) and (d) and 5(b)) also involves the question of whether or not in the compilation of a numerical telephone directory, in which the information is arranged according to number followed by the name of the subscriber, the use of the names and telephone numbers found in such alphabetical telephone directories constitute a fair use of such material or whether the copyrights of said alphabetical telephone directories are thereby infringed.

The appeal (Assignments of Error 9) also raises the question of whether or not the appellee offered sufficient evidence during the trial of the cause to support the ruling of the district court in refusing to dismiss the bill of complaint as to the appellant Dagmar Leon.

If the appellee's copyrights in said alphabetical telephone directories are invalid, or, if found valid, it should be held that the appellants' use of the material within the same was a fair use, then, of course, it follows that the findings of fact, final order, judgment and decree of the district court are not supported by the evidence and are contrary thereto; that the conclusions of law upon which said order, judgment and decree are based are not supported by

and are contrary to the findings of fact entered herein and to the evidence upon which same were based, and the denial of the relief prayed for by the appellants in their answers, and the issuance of the preliminary injunction were contrary to law and not supported by the evidence, as set forth in Assignments of Error 1, 2, 3, 6, 7, 8 and 10, respectively. (Tr. 105-109.)

SPECIFICATION OF ERRORS TO BE RELIED ON.

The appellants here rely upon the following Assignments of Error, grouped for the purposes of argument in the manner indicated:

I-4(a) and (b) and 5(a);
II-4(c) and (d) and 5(b), and
III-9.

ARGUMENT.

I.

ASSIGNMENT OF ERRORS.

4. That the evidence adduced herein is insufficient to support any or all of the following findings which were adopted by said United States District Court for the Northern District of California in the making of its said Order, Judgment and Decree, namely:

(a) "The collection, editing, compilation, classification, arrangement, preparation of the material in said directories and the publication of said directories involved a large amount of detail and required great effort, discretion, judgment, painstaking care, skill, labor, accuracy, experience and authorship of high order. Said telephone

directories were the sole and exclusive property of plaintiff, and plaintiff possessed the sole and exclusive literary and other rights therein, including the right to copy. Said directories constitute new and original literary works, and are the proper subject of copyright. Said copyrights are existing and plaintiff is the sole and exclusive owner, author and proprietor thereof.", as set forth in paragraph V of said Findings.

(b) "The copyright of plaintiff's said May, 1935, directories is valid.", as set forth in paragraph VI of said Findings.

5. That the said order of said United States District Court for the Northern District of California in adopting its findings of fact, upon which said Order, Judgment and Decree is based, failed to take into consideration the following proposed amendments and additions thereto regularly submitted to said Court on behalf of the Defendants herein, namely:

(a) An amendment to Paragraph V of the findings of fact consisting in the deletion therefrom of the first two sentences, beginning "The collection, editing * * *", in line 1, and ending "* * * right to copy.", in line 9 thereof.

The question of the validity of appellee's copyrights in its alphabetical telephone directories, raised by the foregoing assignments of errors, will be discussed under the following headings:

I(a) Invalidity of copyrights in alphabetical Telephone Directories.

I(b) Scope of copyrights in alphabetical Telephone Directories, if valid.

I(a) Invalidity of copyrights in alphabetical telephone directories.

In considering the question of the validity of the appellee's copyrights in its alphabetical telephone directories, it is believed proper to examine the procedure involved in compiling and preparing them for publication.

The directory manager for appellee, Henry R. Woltman, testified in substance that the following steps are taken:

1. Immediately upon issuance of a directory, specimens are cut up into columns and pasted on a sheet to serve as the manuscript for the next book. (Tr. 57.) A specimen of the manuscript is found in plaintiff's (appellee) Exhibit 3*.

2. Appellee receives an application for service from the customer and determines from him the "directory listing, the name, address, etc." (Tr. 53.) Plaintiff's (appellee) Exhibit 9 is a specimen application card.

3. From the application the appellee's business office prepares and issues an order covering the installation of service it lists in the telephone directory, and there is a copy of this for the directory work. The information contained in this copy is then inserted in the manuscript. New listings are typed on the manuscript in a column opposite to the pasted column cut from the directory. (Tr. 56-57.)

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*The original exhibits as introduced at the trial were by stipulation of counsel and order of court (Tr. 119-122), transmitted to and filed with the clerk of this court.

4. In the compilation of the classified section of the directories a similar manuscript is kept, in classified rather than alphabetical order. (Tr. 58.)

5. The "preliminary pages" relative to methods of dialing and the imparting of like information are "a matter of common usage, etc."

"This is a matter that changes from time to time, and the information is prepared by certain people in the company. * * * The matter would appear in the previous issue and would be used as the basis, * * *." (Tr. 65-66.)

6. The pages between the alphabetical section and the first page of the classified section are called "filler".

"It comprises an institutional advertisement of the telephone company. There is also an institutional advertisement at the end of the classified section. There are seven pages, enough to make up a 32 or 54 page form in the printing operation." (Tr. 66.)

7. Following the "closing date" for each directory, the manuscript is proof read and the books are printed and distributed. (Tr. 58.)

Appellee has alleged (Bill of Complaint, Par. X, Tr. 6-7) that directories so prepared are new and original literary works and are proper subject matter of copyright, since:

"The collection, editing, compilation, classification, arrangement and preparation of the material included in said directories required

discretion, judgment, painstaking care, skill and experience of a high order."

It appears obvious that the contrary is true. The work of appellee's employees in compiling its alphabetical telephone directories is mere clerical routine, wholly devoid of originality, intellectual skill, or literary value.

National Tel. v. Western Union, 199 Fed. 294, 297, 298 (C. C. A. 7th, 1902).

"It would be difficult to define, comprehensively, what character of writing is copyrightable, and what is not. But for the purposes of this case, we may fix the confines at the point where authorship proper ends, and mere annals begin. Nor is this line easily drawn. Generally, speaking, authorship implies that there has been put into the production something meritorious from the author's own mind. * * *

'A catalogue, or a table of statistics, or business publications generally, may thus belong to either one or the other of these classes. If, in their makeup, there is evinced some peculiar mental endowment—the grasp of mind, say in a table of statistics, that can gather in all that is needful, the discrimination that adjusts their proportions—there may be authorship within the meaning of the copyright grant as interpreted by the courts. But if, on the contrary, such writings are a mere notation of the figures at which stocks or cereals have sold, or of the result of a horse race, or base-ball game, they cannot be said to bear the impress of individuality, and fail, therefore, to rise to the plane of authorship. *In*

authorship, the product has some likeness to the mind underneath it; in a work of mere notation, the mind is guide only to the fingers that make the notation. One is the product of originality; the other the product of opportunity." (Italics ours.)

That alphabetical telephone directories have been judicially characterized as being works of an uncopyrightable nature, in the light of *National Tel. v. Western Union,* supra, seems clear from—

California Fireproof Storage Co. v. Brundige, 199 Cal. 185; 248 Pac. 669

"A telephone directory is an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience. It is as much so as is the telephone receiver itself, which would be practically useless for the receipt and transmission of messages without the accompaniment of such directories. The form which such directories conveniently took with the inception of this modern method of message transmission was that of an alphabetical list of the names of the subscribers to the service, and there can be no question as to the right of the regulatory body over this form of public utility to regulate the form, content, and cost to subscribers who had entitled themselves to the convenient use of such service."

"In the development of this form of public service telephone companies have found it practicable and profitable to diminish the cost and increase the profits of the operation by making use of its directories as a means and form of advertising available to its subscribers."

The case at bar is believed to be one of first impression, since no prior adjudicated cases have been found passing squarely on the question of copyrightability of an alphabetical telephone directory or the extent of fair use of the material contained therein.

The only case of which we are aware which deals specifically with an alphabetical telephone directory under any phase of the law of copyright is *Cincinnati and Suburban Bell Telephone Co. v. Brown,* 44 Fed. (2d) 631. It is apparent that in the cited case the court entertained considerable doubt as to whether a simple alphabetical telephone directory was proper subject matter for copyright. In considering the *alphabetical* telephone directories published by the defendant in the face of plaintiff's *alphabetical* telephone directory, alleged to have been copyrighted, the court had this to say:

> "Whether or not, strictly speaking, the telephone company is entitled, under the strict rules of copyright law, to this injunction, I am not going to pass on at this time."

At least one eminent authority has plainly expressed a similar doubt as to the copyrightability of directories of this character and in *Weil, Law of Copyright,* Sec. 1151, we read:

> "All such works have one common foundation: their contents are intended for use. They are tools in printed form and are intended to be used according to this essential purpose. There is normally no copyright in their contents, as they mutually embrace facts and figures which are common property. Anyone may reproduce their facts and they, themselves, are primarily intended

to apprise others of such facts. *In the average directory, for example, names must be arranged alphabetically and, in digests, subjects must be arranged under the headings where those consulting the digests would expect to find the information they are seeking.*" (Italics ours.)

Appellee in the court below referred to the decision in

Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 Fed. 83,

and an annotation in 26 A. L. R. 585, and will undoubtedly contend here, as it did in the court below, that because copyrights in certain types of directories have been sustained it necessarily follows that an alphabetical telephone directory is a proper subject matter for copyright. Such an argument fails to take into consideration the fundamental distinction between directories of the type considered in *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.,* supra, and an alphabetical telephone directory of the kind and character relied upon in the present case by the appellee. In the cited cases it is clearly indicated that the publishers of the works canvassed the field for the desired information and then compiled the works in question. That is to say, the information was accumulated for its independent value and was acquired by sheer industry for what it alone would be worth to the public in published form.

In contrast, it is equally clear that the compilation of an alphabetical telephone directory by a telephone company is a mere incident to the public service rendered and the information is furnished by appli-

cants for service for insertion in the continuing manuscript. (Tr. 56-57.) In other words, the appellee's alphabetical telephone directory results naturally from its mere assignment of numbers to subscribers upon application and the routine clerical work in arranging such names, addresses and telephone numbers in logical order. The alphabetical telephone directory is a mere recording of facts in a manner which has been judicially characterized as a common incident to the furnishing of a telephone service and it is respectfully contended that the monopoly offered by the copyright acts cannot be extended to such a work.

I(b) Scope of copyrights in alphabetical telephone directories, if valid.

If it be assumed, for the sake of argument, that appellee's copyrights are valid, a proper inquiry should be directed to ascertain the scope of the same. That is to say, are appellee's alphabetical telephone directories wholly original works or does some part of them lie in the public domain?

This test has received judicial approval because it bears a close relation to the question of infringment.

> *Weil, Law of Copyrights,* Sec. 984.
>
> "* * * The scope of copyright is, then always measured by the extent of, and nature of, the original work embodied in a creation."

This authority was cited with approval in

> *Harold Lloyd Corporation v. Witwer,* 65 F. (2d) 1,

a fairly recent decision by this honorable court.

Applying this test to the alphabetical telephone directories in suit, it will be appreciated that the zone of protection to be accorded appellee, if validity as to the whole book be assumed, is not the alphabetically arranged lists of names, addresses and telephone numbers, but merely the preface or introduction, the institutional advertising and the classified sections. The appellants are not charged by the complaint with infringement of anything but the alphabetical sections, nor did the evidence show the use by appellants of any material contained in appellee's directories other than the numbers and names.

The soundness of this argument is borne out by the appellee's own evidence, for it will be remembered that the assignment of numbers to new subscribers, the correction of numbers, and the compilation of appellee's directory were shown as clerical duties. It is difficult to perceive how one could seriously contend that there can be originality or literary matter in the names and addresses of subscribers submitted on applications for service or in the numbers asssigned such subscribers as a matter of convenience.

With these points in mind, how far should the courts go in protecting the proprietor of an alphabetical telephone directory against infringement? We apprehend that a good test is that laid down in

> *Sheldon v. Metro-Goldwyn Picture Corp.*, 7 F. S. 837.
>
> "It is then left to the courts, if litigation ensues, to say what the original content is, and to define the zone in which the copyright owner is protected.

> In defining the zone it always has to be determined: (1) Whether some part of the zone claimed is not a part of a common ground, the heritage of all mankind, usually referred to as the public domain; or (2) whether some of the infringement claimed is not of matter which is not protected by copyright for some other reason."

A person's name and address are facts. A telephone number assigned that person, as a subscriber to the service, is also a fact. The law of copyright grants no monopoly in facts as such, but merely in the manner, form and style of presentation. Hence, if validity of appellee's copyrights be assumed for argument's sake, appellee's zone of protection is not in the facts included in the alphabetical lists of names, addresses and telephone numbers, but rather in the manner, form and style of presentation of the facts, plus its introductory matter, private and public advertising.

See,

Dymow v. Bolton, 11 F. (2nd) 690 (C. C. A. 2nd).

> "Just as a patent affords protection only to the means of reducing the idea to practice, so the copyright law protects the means of expressing an idea; and it is as near the whole truth as generalization can usually reach, *that if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights result, and no infringement will exist."* (Italics ours.)

In the numerical telephone directories the facts, comprising numbers and names, are not presented in

the same manner, form or style employed in the alphabetical telephone directories.

II.

ASSIGNMENT OF ERRORS.

4. That the evidence adduced herein is insufficient to support any or all of the following findings which were adopted by said United States District Court for the Northern District of California in the making of its said Order, Judgment and Decree, namely:

(c) "Defendants copied and transferred into said numerical directories, without the consent or license of plaintiff and in violation of plaintiff's rights under its copyrights, valuable and material portions of plaintiff's copyrighted May, 1935, directories, and thus saved themselves the expenditure of a large amount of time, labor and money. Defendants took and appropriated to their own use the entire portion of the alphabetical section of plaintiff's May, 1935, directories, and did not obtain any of the information contained in their numerical directories from original sources or from any source other than plaintiff's said directories. Defendants' said copying of plaintiff's said directories was deliberate and premeditated and constituted an infringement of plaintiff's said directories.", as set forth in Paragraph VII of said Findings.

(d) "Defendants have infringed plaintiff's copyrights of its May, 1935, directories", as set forth in Paragraph VIII of said Findings.

5. That the said order of said United States District Court for the Northern District of Cali-

fornia in adopting its findings of fact, upon which said Order, Judgment and Decree is based, failed to take into consideration the following proposed amendments and additions thereto regularly submitted to said Court on behalf of the Defendants herein, namely:

(b) An amendment to the findings of fact consisting of the deletion of the whole of Paragraph VIII and substitution of the following: "The use of the material within plaintiff's copyrighted alphabetical telephone directories for 1935 by the Defendants in the compiling and publishing of their numerical telephone directories was an unfair use, and therefore an infringement thereof."

In considering the question of infringement raised by the foregoing assignments of errors, the argument will be presented under the following headings:

II(a) Appellants' use of appellee's Alphabetical Telephone Directories.

II(b) Appellants' use of appellee's Alphabetical Telephone Directories a fair use and not an infringement.

II(c) Analogous Instances of Fair Use.

II(d) The Directories in the present case are neither competitive nor for the same purpose or use.

II(e) Appellee's telephone directories are the original source of material contained therein.

II(a) Appellants' use of appellee's alphabetical telephone directories.

In order to fully appreciate the extent of the appellants' use of the material in the appellee's alphabetical telephone directory, it is deemed proper to consider the individual steps taken in the compilation, preparation and publication of the appellants' numerical telephone directory.

The evidence adduced upon the trial of the cause shows the following:

1. A sheet was removed from the alphabetical section of the telephone directory and the reverse side of it ruled out.

2. The columns of listings were then cut from these sheets.

3. The individual listings were then cut from the columns and placed in boxes according to the exchange telephone number of that particular listings.

4. When all of the numbers had been placed in the various exchange boxes they were removed and pasted on a looseleaf binder sheet in numerical order.

5. Typewritten list of these pasted listings were then made, in which process the order of the listing was reversed and the address omitted, so that the listing appeared on the new typed list as: "Garfield 6133 Norbert Korte".

6. The typewritten lists were then proof read against the pasted sheets and against the original

source of the information, namely appellee's alphabetical telephone directory.

7. Following the proof reading the typewritten lists were reduced by photographic process and the plates were made. (Tr. 91-93.)

It is this use of the specific information in the appellee's alphabetical telephone directories which we contend first was use of material within the public domain and secondly a fair use of material in a copyrighted work or a use necessarily contemplated at the time of publication of the appellee's work.

It was admitted in the answer (Par. XI Tr. 33) that the alphabetical telephone directories were employed in the collection, compilation, editing and preparation of the material included in appellants' numerical telephone directory and that there was a commonness of errors. Further it was stipulated during the trial of the cause that appellants used the numbers and names which appear in the A to Z sections of appellee's directories (not including classified) in the compilation of appellants' numerical telephone directories and that no other source was used. (Tr. 77.) Thus in substance, it will be appreciated that the only material in appellee's alphabetical telephone directories which was used by the appellants in the preparation of their numerical telephone directory were the numbers and names of the subscribers taken from the A to Z sections.

II(b) Appellants' use of appellee's alphabetical telephone directories, a fair use and not an infringement.

The facts here show that the appellants employed the appellee's alphabetical telephone directory in the compilation of their numerical telephone directory. The mechanics of such use have been hereinbefore described. Here was a use of material which is in the public domain and in which there can be no monopoly. It was a use of material such as was contemplated by appellee in publishing the directories.

At this point, attention is respectfully invited to the following quotation from *An outline of Copyright Law,* by *De Wolfe,* pp. 142-143:

> "Returning now to the question of 'fair use', briefly mentioned in Chapter V, we have seen that the term means such use as the author must be supposed to have reasonably contemplated at the time when he created his work, notwithstanding the monopoly which the law allows him. The quotation of considerable extracts from a work under review, *the use of directories in the compilation of selected mailing lists,* the copying of legal forms from works giving examples for such forms, are all instances of fair use. A peculiar application of the doctrine is also found in the law relating to parodies, which often approach actual copying, but have always been held legitimate.
>
> *'A test sometimes used to determine whether what has been done with the copyrighted work exceeds the limit of fair use is to inquire whether the demand for the original work has been diminished to a substantial extent through competition from the alleged infringement.'* " (Italics ours.)

Weil, Law of Copyrights, Section 1135, states that the general rule has been well summarized as follows:

> "In short we must in deciding questions of this sort look to the nature and objects of the selection made, the quantity and value of the material used and the degree to which the use may prejudice or diminish the profits or supersede the objects of the original work."

quoting from *Story, J.* in *Folsom v. Marsh,* 2 Story 100, 116.

This principal is not new by any means and was recognized even in the earliest cases. See:

Lawrence v. Dana, Fed. Case No. 8136
(Mass. 1869.)

> "Some use may be made by a subsequent writer of the contents of a book or treatise antecedently made, composed and copyrighted by another person, whether the contents of the antecedent book or treatise were wholly original, or were partly original and partly made up of selections from other authors. *Copyright differs in this respect from patent rights, which admits of no use of the patented thing without the consent or license of the patentee."* (Italics supplied.)

It is the contention of the appellants that the use made of appellee's alphabetical telephone directory was a "fair use" within every possible interpretation of the rule.

In

West Publishing Co. v. Edward Thompson Co.
176 Fed. 833, 838, (C.C.A. (2d)),

in speaking of fair use of a *digest,* the court said:

"Its purpose is as a tool to enable judges to write their opinions, lawyers to write their briefs, and authors to write their text books. Such persons may cut out parts of the digests to assist them in running down the cases and copy lists of cases from the digests, as many of the Defendant's writers have done. Such a use of the digests seems to us, differing in this respect from the court below, to fall directly within the purpose for which they are sold, and to be fair."

II(c) Analogous instances of fair use.

In the absence of precedent dealing specifically with telephone directories, it is believed the court will desire authorities passing upon the applicability of this doctrine to analogous uses. With this in mind, the following cases are collected:

In *Brief English System Inc. v. Owen,* 48 F. (2d) 555 (C.C.A. (2d), certiorari denied in 51 S.Ct. 650), the plaintiff claimed a copyright in books relating to a system of shorthand, consisting in writing words in less than the number of letters usually used to spell them out. Defendant's book employed the fundamental idea of plaintiff's system and was a mere variation of it, but there was no substantial appropriation of manner, method, style or literary thought. Held, *no infringement.*

In *G. Ricordi & Co. v. Mason,* 210 F. 277 (affirming decree in 201 F. 182, 184) the defendant published a booklet giving a description of the plot and characters of various operas, each scene being covered by a single paragraph. Held not a "version" or an infringement of the copyrights on the librettos.

In *Whist Club v. Foster,* 42 F. (2d) 782, the Defendant's book contained a re-statement of the rules of auction bridge stated in plaintiff's book. Held, *no infringement.*

In *Gothrie v. Curlett,* 36 F. (2d) 694, a tariff index was involved and, although the plaintiff's copyrights were held valid, the defendant's use was regarded as fair. The court had this to say (p. 696):

> "* * * but the appellant has no monopoly upon information, or the purveying of information by a broad general method. He must be protected in his choice of expression, and his copyrights held to that."

See also, the dictum in the well reasoned case of *Sampson & Murdock Co. v. Seaver-Radford Co.,* 140 Fed. 539 (C.C.A. 1st, 1905):

> "Also, instances may be easily cited where portions of a copyrighted book may be published for purposes other than those for which the original book was intended. *This may be particularly so where the second publication has an entirely different outlook from the first.* Clearly, in a philosophical work, the title 'The Martian', if it can be copyrighted, could not be regarded as infringing a work of mere imagination with the same title. *So it may be that the copying and rearranging of a general directory for a bona fide and limited purpose, such as compiling a social guide may come within the same rule."* (Italics ours.)

The appellee has sought to make much in its pleadings, affidavits on preliminary injunction, and at the trial, of the commonness of errors between the two directories.

If the rule of "fair use" be applicable, as appellants contend it is, commonness of errors is wholly immaterial.

See *Simms v. Stanton,* 76 F. 6.

Furthermore, it must be remembered that the appellee's alphabetical telephone directory is the sole source of the telephone numbers contained therein and if appellee errs, so it follows that all who put its directories to their intended use likewise err.

> *Weil, Law of Copyrights,* Sec. 1142.
>
> "A recognized form of review, although its nature is not always fully appreciated by its victims, is parody. It is entirely within the limits of fair use to make parodies or literary perversions of copyrighted works, even, it seems, in the form of drawings or cartoons."

Citing *Bloom & Hamlin v. Nixon,* 125 F. 977, and *Hill & Whalen v. Martel, Inc.,* 220 F. 359; *Story v. Holcome,* 4 McLean 310.

The present case may be likened to those cases passing on the question of mimicry or parody. It has been held that one may sing the chorus of a copyrighted song as an incident to the mimicry of another's rendition of the whole song. See

> *Bloom & Hamlin v. Nixon,* supra;
>
> *Green v. Minzensheimer,* 177 Fed. 286 (S.D.N. Y. 1909).

It would seem that the use, in the compilation of a numerical telephone directory, of the numbers and names of telephone subscribers, appearing in the

alphabetical section of a telephone directory, comes as much under the doctrine of fair use as the singing of a chorus of a copyrighted song in the imitation of another's rendition of the whole song. In each instance the second use of the material of the copyrighted work was for a different purpose and result and does not serve as a substitute for the original.

The present case is readily distinguished from the line of authorities dealing with directories of a competitive nature, such as one city directory against another. The doctrine of fair use as applied to these cases has been summed up in

> *Amdur, Copyright Law and Practice* (1936 *Edition*) p. 768, Chap. 22.
>
> "The question has arisen in many cases whether the use made of a copyrighted directory, by a subsequent compiler of a similar publication, is a fair or an infringing use. The general rule, according to the weight of authority, is that such use will be deemed a *fair use* where:
>
> '1. The subsequent compiler, having first made an honest, independent canvass * * *
>
> '2. * * * merely compares and checks his own compilation with that of the copyrighted publication, and publishes the result * * *
>
> '3.* * * after verifying the additional items derived from the copyrighted publication.
>
> *Dun, et al., v. Lumbermen's Credit Assn., et al.,* 144 Fed. 83, 84 (C.C.A. 7th, 1906)."

An anology may be seen between the use of numbers and names in the instant case and the use of a list of cases cited in a legal text-book. At least one case

stands for the proposition that use of the entire list of cases in such a work may not amount to infringement. See

West Publishing Co. v. Thompson Co., 169 Fed. 833 (E.D.N.Y. 1909), (modified in 176 Fed. 833, C.C.A. 2d).

(p. 847):

"In so far, also, as the arrangement of cases is concerned, when printed in chronological order in an official publication, *the list of titles or index is also public property,* and the only portion of the official reports which is subject to copyright in the name of an individual is the syllabus or statement by the reporter, whether that reporter be a judge or another person, and any statement of facts produced by original work, and not filed as a part of the decision by the court." (Italics ours.)

So it is here, since a numerical telephone directory is not intended to nor does it convey the same information to its users as does an alphabetical telephone directory.

II(d) The directories in the present case are neither competitive nor for the same purpose or use.

In considering the applicability of the fair use rule, the authorities, notably *An Outline of Copyright Law, DeWolfe,* pp. 142-143 and *Weil, Law of Copyrights,* Sec. 1135, supra, indicate it is proper to inquire

"whether the demand for the original work has been diminished to a substantial extent through competition from the alleged infringement."

and

> "the degree to which the use may prejudice or diminish the profits or supersede the objects of the original works."

The evidence in the present case is clear and convincing that appellants' numerical telephone directory is intended for and used for an entirely different purpose than is appellee's alphabetical telephone directory.

The uncontradicted testimony of the witness, William E. Church, an expert in charge of the private telephone communication system for Shell Oil Company, testified in substance, that the "prime" use of a numerical telephone directory is the "checking use". That is, its use in checking the identity of persons whose telephone numbers have been left for call. He did not think "the numerical telephone directory would be put to the same use or duplicate in any sense the utility of the alphabetical telephone directory". (Tr. 97.)

> "I can hardly see how you could turn to this (numerical) directory to place a telephone call. Obviously, you would have quite a time if you wanted to look up John Doe, looking through all the book to find that John Doe's number was in this directory." (Tr. 97.)

The record also reveals that appellee is well aware of the difference in the use and purpose of the two directories. Its witness Woltman testified:

> "I understand that a numerical telephone direc- is used very largely for check-up on names of

somebody, some person who has called and left a number." (Tr. 64.)

Nor did the evidence adduced at the trial leave any doubt as to the usefulness of a numerical telephone directory. It was admitted by appellee's counsel that in so far as it is accurate and kept up to date, a numerical telephone directory is *a useful publication.* (Tr. 89.)

In so far as the question of accuracy and being kept up to date is concerned, the evidence leaves no doubt but that a numerical telephone directory, in the preparation of which fair use of numbers and names from an alphabetical telephone directory has been made, the former directory is no more obsolete or out of date than the latter. Appellee's witness Woltman testified as follows:

> "As to the numerical telephone directory containing obsolete material, the same is true of the telephone company's alphabetical directory. As to certain numbers and certain information contained therein it is obsolete the day it comes off the press." (Tr. 63.)

A further indication of usefulness is to be found in the testimony of the witness Church who said:

> "In my opinion as a telephone man the directory I hold in my hand (plaintiff's Exhibit 6, a numerical telephone directory) has a very useful purpose." (Tr. 96.)

II(e) Appellee's telephone directories are the original source of material contained therein.

It is the contention of the appellants that the appellee's alphabetical telephone directories are the original source of the material contained therein. It will be borne in mind that the appellee is a public utility furnishing telephone service to the public upon application. We have heretofore pointed out that when these applications are made the subscriber necessarily gives his name and address. Appellee assigns each applicant a telephone number and the evidence does not show that the applicant has any choice as to the number which is assigned to him.

The appellee periodically publishes its telephone directories to apprise the subscribers and public of the facts contained therein, and there is no question but that, for the public generally, this is the sole source of the information alphabetically arranged.

At the trial of the cause the appellee contended, and will doubtless contend here, that the fact that the appellants had not gone to the subscribers for the information contained in their numerical telephone directories was a factor which served to characterize the acts of appellants as infringements of the copyrights. We submit that in seeking the names and numbers of the telephone subscribers, appellee's books are the original source of the information, and that appellee intends and expects that they should be so regarded.

III.

ASSIGNMENT OF ERRORS.

9. That the Order of said Court denying the motion of the defendant, Dagmar Leon, to dismiss the Bill of Complaint as against her was not supported by and was contrary to the evidence adduced herein, to which said Order timely exception was noted by said defendant.

The motion of appellant Dagmar Leon, to dismiss as to her the bill of complaint, made during the trial of the cause was denied and an exception was allowed as requested.

The evidence does not support a charge of infringement as to this appellant and it is respectfully submitted that the district court erred in denying his motion.

Fred S. Leon, appellant herein, testified that:

"My business is the publication of the Numerical Telephone Directory. It is owned by me. To my knowledge I have no partner in that business. (Tr. 94.)

"I have recorded a certificate of doing business under a fictitious name in support of my claim to proprietorship as an individual of the business conducted under the name and style of Numerical Directory." (Tr. 96.)

Appellant Dagmar Leon testified that:

"I had nothing to do with the management of the business nor the giving of any directions respecting the manner in which the business of the Numerical Telephone Directory, either in Oakland or San Francisco, was conducted. It was

definitely understood I was to have nothing to do except with the compiling. I had such an understanding with my husband. To my knowledge, no one other than my husband, Fred Leon, had any direction or control over the affairs of the business of the numerical directory either in San Francisco or Oakland."

We submit that on these facts it was plain error for the District Court to regard this appellant as an infringer and jointly, or even severally, liable with her husband for infringement.

Dagmar Leon was a mere employee and in the same position, in so far as liability is concerned, as the other employees of her husband who performed mere clerical duties in the preparation, and publication of the numerical telephone directory. She was a workman and nothing more.

While no reported copyright decision has been found defining the liability of mere workmen, it is urged that the rule which obtains in patent infringement cases is controlling here. In those cases workmen, although instrumental in committing the *physical* acts of infringement, are not liable therefor.

See

Cramer v. Fry, 68 Fed. 201, 206 (N. D. Calif. 1895).

"A strict application of the rule would make all servants liable, but a distinction has obtained between mere workmen and agents. The distinction may be artificial and arbitrary, and though starting apparently in a dictum in Delano v. Scott, Fed. Case #3,753, and based upon con-

sequences somewhat fanciful, nevertheless seems to have maintained itself and is as firmly established as nisi prius decisions can establish any rule of law. With this exception, the rule is that servants and agents are responsible. Estes v. Worthington, 30 Fed. 465."

CONCLUSION.

We respectfully submit that the record in this case provides the basis for the drawing of the following conclusions:

1. That in preparing and publishing its alphabetical telephone directory the appellee has produced a work which is wholly devoid of copyrightable subject matter in so far as it includes the alphabetical arrangement of the names, addresses and numbers of telephone subscribers; and that the copyrights, to that extent, should therefore be held invalid.

2. That if appellee's copyrights in its alphabetical telephone directories are deemed valid as to the whole of each of the directories, then the scope of the same is limited to that which comprises the classified section and directional and institutional advertising matter and not the mere names, numbers and addresses making up the alphabetical section thereof.

3. That the use of the numbers and names appearing in appellee's alphabetical telephone directory by appellants in preparing their numerical

telephone directory was a fair use and not an infringement of any of appellee's copyrights.

4. That it was reversible error for the District Court to deny the motion of the appellant, Dagmar Leon to dismiss as to her the bill of complaint, in so far as she was concerned in the face of incontrovertible evidence that her husband, appellant Fred S. Leon, was the sole proprietor of the business of preparing and publishing the numerical telephone directories.

Wherefore it is respectfully prayed that the judgment of the District Court should be reversed in these respects in order that justice may be done in the premises.

Dated, San Francisco,
February 17, 1937.

Respectfully submitted,
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No. 8397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co.,
Appellants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLEE.

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No. 8397

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from a decree in a suit arising under the Copyright Act (Tr. p. 2). The District Court had jurisdiction under subsection (7) of section 24 of the Judicial Code (U.S.C. 28:41):

> "The district courts shall have original jurisdiction as follows:
> * * * * * * *
> (7) * * * all suits at law or in equity arising under the * * * copyright * * * laws."

This court has jurisdiction upon appeal to review the District Court's decree under section 128 of the Judicial Code (U.S.C. 28:225):

"(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions——

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345[1] of this title."

STATEMENT OF THE CASE.

At least since October, 1908, appellee has been compiling and publishing two directories of certain of its telephone subscribers entitled first, "Telephone Directory, San Francisco and Bay Counties," herein called "San Francisco directory" (Ex. 1[2]) and second, "Telephone Directory, Oakland, Alameda, Berkeley, San Leandro and Bay Counties," herein called "Oakland directory" (Ex. 2). Appellee has published these directories with notice of copyright and has received certificates of copyright therefor since October, 1908 (Exs. 7 and 8, Tr. p. 45).

The San Francisco directory is arranged in four sections: first, an alphabetical listing of appellee's San Francisco subscribers; second, a classified listing of appellee's San Francisco subscribers; third, an alphabetical listing of appellee's Oakland, Alameda, Berkeley and San Leandro subscribers, and, fourth, an alphabetical listing of appellee's subscribers in other cities and towns in the Bay area, which includes a number of the smaller towns in the vicinity of San Francisco. The Oakland directory is likewise arranged in four sections: first, an alphabetical

1. U.S.C. 28:345 is not involved in this case.
2. The original exhibits were, by order of court (Tr. pp. 119-122), filed with the clerk of this court and made a part of the record in this case.

listing of appellee's Oakland, Alameda, Berkeley and San Leandro subscribers; second, the Oakland, Alameda, Berkeley and San Leandro classified section; third, an alphabetical listing of appellee's San Francisco subscribers, and, fourth, an alphabetical listing of appellee's subscribers in other cities and towns in the Bay area, the same, in this respect, as the San Francisco directory.

The San Francisco alphabetical section of the May, 1935, issue contained 160,266 listings and the Oakland alphabetical section 97,512 listings, representing 243,100 telephones in service in San Francisco and 120,784 in Oakland, Alameda, Berkeley and San Leandro (Tr. p. 56).

The alphabetical sections of these directories are prepared in the following manner:

An applicant for telephone service signs an application card[3] which contains the listing as it appears in the directory. From the application card, appellee's business office prepares an order for the installation of a telephone. A copy of this order is sent to appellee's directory department for use in compiling the new directory.

The manuscript[4] for a new directory is prepared by cutting up the columns of the last directory and pasting them on sheets of paper. As the directory department is advised, by order from the business office, of changes to be made in the old directory, the old listing, if dropped or changed, is crossed out and the new one, if any, is typed out on the column next to the column cut from the old directory (Tr. pp. 56-57).

3. Exhibit 9 is an application card.
4. Exhibit 3 is manuscript used in compiling the May, 1935, San Francisco directory.

Appellee made 109,407 of such changes in the San Francisco alphabetical section manuscript from the time the May, 1935, directory was issued until the next directory was issued in 1936. For the Oakland alphabetical section there were 60,751 such changes during the same period. It cost appellee $295,222 to compile, publish and distribute the May, 1935, issues of the San Francisco and Oakland directories (Tr. pp. 59-60).

In 1935 the appellants published and sold to the public numerical telephone directories entitled "Numerical Telephone Directory, San Francisco and Other Cities and Towns, 1935-36" and "Numerical Telephone Directory, Oakland, Berkeley, Alameda, San Leandro, 1935" (Exs. 5 and 6, Tr. p. 61). The material in appellants' directories was copied entirely and exclusively from the alphabetical sections of appellee's San Francisco and Oakland directories, and no other source was used to obtain the information appearing therein (Tr. p. 77). The appellants copied the information in the following manner: A page was taken from the alphabetical section of appellee's directory and the listings on the back of the page were ruled out. The page was cut into the columns into which it was divided and thereafter the alphabetical listings in each column were in turn cut out. The listings so cut out were then placed in boxes classified according to the prefix of the telephone number; for example, the listing "Pillsbury Madison & Sutro attys 225 Bush GArfld 6133" was placed in a box marked and containing "Garfield" listings. After this had been done, the listings were removed one at a time from the boxes and arranged upon loose

leaf binder pages[5] in numerical order according to the telephone number and then pasted to the pages. Typewritten sheets then were made from these pages, and in so doing the order of each listing was reversed so that the telephone number preceded the name (the prefix and the address being omitted) so that, in the example given, the specimen listing would read "6133 Pillsbury Madison & Sutro". The typewritten sheets, thus made up, were proof read against the pasted binder pages and sent to the printer as copy from which to print the numerical telephone directories. This process was followed until each listing in the alphabetical sections of appellee's San Francisco and Oakland directories was covered. Appellants did no independent canvassing or collection of information, or even verification of the information, in compiling their directories (Tr. pp. 91-93).

A comparison of 1000 listings in appellee's May, 1935, San Francisco directory with the corresponding listings in appellants' San Francisco numerical telephone directory showed the latter to be approximately fourteen per cent erroneous. Some of the errors consisted of omitted listings and some were incorrectly spelled (Tr. p. 101).

The questions thus involved are (a) whether appellee's copyrights of its directories are valid and (b) whether appellants, by copying the information into their directories, have infringed the copyrights. These questions are raised by the assignment of errors to the findings of fact, to the conclusions of law and to the District Court's decree.

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5. The appendix contains a photostatic copy of Exhibit 15 which is one of appellants' loose leaf binder pages.

SUMMARY OF THE ARGUMENT.

1. Appellee has a valid and subsisting copyright for its May, 1935, directories and those issues preceding it since October, 1908.

2. Appellee's copyright of its alphabetical telephone directories protects it against the copying of the alphabetical as well as of the other sections of the directories.

3. Appellants' copying of material from appellee's directories is not a fair use of them, but an infringement of appellee's copyright.

4. Independently of any other consideration, the doctrine of "fair use" should not be invoked in cases where its application would result in harm to the proprietor of the original work.

5. The District Court properly held that Dagmar Leon was liable as an infringer; she actively assisted in the compilation of appellants' directories, sold them to the public and offered to sell the business of appellants to appellee.

ARGUMENT OF THE CASE.

1. APPELLEE HAS A VALID AND SUBSISTING COPYRIGHT FOR ITS MAY, 1935, DIRECTORIES AND THOSE ISSUES PRECEDING IT SINCE OCTOBER, 1908.

The Copyright Act specifically provides that directories may be copyrighted.

Section 5 (a) of the Copyright Act (U.S.C. 17:5) is as follows:

> "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, *directories,*[6] gazetteers, and other compilations; * * *."

In the following cases the courts recognized that directories may be copyrighted and that the owner of the copyright is entitled to protection from infringement:

Jeweler's Circular Pub. Co. v. Keystone Pub. Co. (2nd C.C.A., 1922), 281 Fed. 83;

Sampson & Murdock Co. v. Seaver-Radford Co. (1st C.C.A., 1905), 140 Fed. 539;

Produce Reporter Co. v. Fruit Produce Rating Agency (D.C., N.D. Ill., 1924), 1 F. (2d) 58;

Social Register Ass'n. v. Murphy (C.C., R.I., 1904), 128 Fed. 116;

26 A. L. R. 585, annotation.

The District Court found that appellee had duly and regularly copyrighted each edition of its directories (from October, 1908, to May, 1935) and the Register of Copyrights at Washington had issued to it his certificate of copyright for each directory issue (Tr. p. 45). This finding is supported by the stipulation of counsel and appellee's Exhibits 7 and 8 (Tr. pp. 73-74). Appellants do not claim that this finding is erroneous.

Certificates of copyrights issued by the Register of Copyrights are prima facie evidence of the facts therein stated. Section 55 of the Copyright Act (U.S.C. 17:55) so provides:

"Said certificate (of copyright) shall be admitted in any court as prima facie evidence of the facts stated therein."

6. Italics throughout the brief are ours.

The appellants offered nothing to rebut this prima facie case and, that being true, it is sufficient proof of a valid copyright.

M. Witmark & Sons v. Calloway (D.C., E.D. Tenn., 1927), 22 F. (2d) 412, 413, holds:

> "There was introduced at the hearing a certificate of copyright registration under seal of the copyright office for this song, showing the copyright in the name of plaintiff. This certificate is prima facie evidence of the facts stated therein. 35 Stat. 1086, c. 320, sec. 55 (17 USCA sec. 55), this being the Copyright Act of March 4, 1909. There is nothing to contradict it, and it is therefore sufficient proof to establish a valid copyright in the plaintiff. Berlin v. Evans (D. C.) 300 F. 677."

Appellants contend that appellee's telephone directories are not copyrightable[7] for the following reasons. First, they argue that the compilation of appellee's directories is mere clerical routine, wholly devoid of originality, intellectual skill or literary value (App. Br. p. 9). This argument, however, assumes that it is necessary that a book contain matter having in it originality, intellectual skill or literary value, in order that it may be copyrighted. Such a contention would be applicable to the compilation of any directory regardless of the subject matter or method of arrangement and ignores the following considerations:

(1) The Copyright Act, section 5 (a) (U.S.C. 17:5) provides for the copyright of "directories" *without limitation as to subject matter or method of arrangement;*

7. In considering appellants' argument on this phase of the case, it is noteworthy that appellant, Fred S. Leon, published a notice of his supposed copyright in appellants' San Francisco directory (Ex. 5, Tr. p. 61).

(2) The courts have uniformly held that directories may be copyrighted. The annotation in 26 A. L. R. 585 lists the following as among the kinds of directories which have been held to be copyrightable: (1) general municipal or territorial directories; (2) business directories; (3) post-office directories; (4) a legal directory; (5) an East India calendar or directory; (6) a directory of illustrations of trade-marks; (7) a classified directory; (8) shipping lists; (9) a society directory; (10) a topographical directory of England; (11) a directory or code of words used in telegraphy; (12) a directory of race horses; (13) a directory of blooded horses; and (14) a list of hounds and hunts.

Regardless of these considerations, the District Court in the case at bar found (Finding V, Tr. p. 47):

> "The collection, editing, compilation, classification, arrangement, preparation of the material in said directories and the publication of said directories involved a large amount of detail and required great effort, discretion, judgment, painstaking care, skill, labor, accuracy, experience and authorship of high order."

As above stated, there were 160,266 listings in the alphabetical section of the San Francisco directory and 97,512 listings in the Oakland alphabetical section. The record shows that about one hundred people are regularly employed in appellee's directory department of whom eight work full time on the alphabetical directory and eight more work part time on it (Tr. p. 59). When it is considered that there were only seventy-seven errors in the entire number of 257,778 listings in the May, 1935, issues of appellee's San Francisco and Oakland directories (Tr.

pp. 23, 24), we submit that the finding, the publication of the directories "involved a large amount of detail and required great effort, discretion, judgment, painstaking care, skill, labor, accuracy, experience and authorship of high order", is amply supported by the evidence.

Second, appellants contend that there is a fundamental distinction (App. Br. p. 12) between the kinds of directories considered in the authorities cited by us and appellee's telephone directories. They argue that in the cited cases the publishers of the works accumulated the information for its independent value and not as a mere incident to the performance of a public service. Without conceding that that contention has any merit, we submit that a sufficient answer to it is that appellee's directories have a use and a value as street address directories independently of and apart from their use as directories for telephone numbers. It is common knowledge that appellee's directories are constantly being used for ascertaining addresses as well as for ascertaining telephone numbers.

National Tel. News Co. v. Western Union Tel. Co. (7th C.C.A., 1902), 119 Fed. 294 (erroneously cited in appellants' brief as 199 Fed. 294 (App. Br. p. 9)) is not, we think, an authority to the contrary. In that case the evidence showed that the Western Union Telegraph Company had collected news and dispensed it on its tickers to persons who paid for it. The National Telegraph News Company hired one of these tickers, took the news as it came over the ticker from the Western Union line and then transmitted the same news on its own tickers to its own subscribers. The court specifically recognized that directories were copyrightable. It said (p. 297):

"Little by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, *directories,* and other works of similar character."

A distinct reason was given for holding that the news appearing on the tickers was not copyrightable, as follows (pp. 298-299):

"Indeed, the printed tape under consideration has no value at all as a book or article. It lasts literally for an hour, and is in the waste basket when the hour has passed. It is not desired by the patron for the intrinsic value of the happening recorded—the happening, as an happening, may have no value. The value of the tape to the patron is almost wholly in the fact that the knowledge thus communicated is earlier, in point of time, than knowledge communicated through other means, or to persons other than those having a like service. In just this quality—to coin a word, the precommunicatedness of the information—is the essence of appellee's service; the quality that wins from the patron his patronage.

Now, in virtue of this quality, and of this quality alone, the printed tape has acquired a commercial value. It is, when thus looked at, a distinct commercial product, as much so as any other out-put relating to business, and brought about by the joint agency of capital and business ability. In no accurate view can appellee be said to be a publisher or author. Its place, in the classification of the law, is that of a carrier of news; the contents of the tape being an implement only, in the hands of such carrier, in its engagement for quick transmission. This is Service; not Authorship, nor the work of the Publisher."

It is plain, therefore, that the reason for the decision in *National Tel. News Co. v. Western Union Tel. Co.,* supra, was because the court felt that the printed tape being merely an exchange of ordinary sightseeing is not a book or article. The appellee's directories are more or less permanent in nature, and clearly come under the designation of books.

The mere fact that the Supreme Court of California, in *California Fireproof Storage Co. v. Brundige,* 199 Cal. 185, 248 Pac. 669, said that a telephone directory is an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience, does not and could not prevent such a directory from being copyrightable. Appellants again ignore the plain language of the statute (Copyright Act, section 5 (a) (U.S.C. 17:5)) that directories may be copyrighted.

Even if the law required[8] the appellee to publish telephone directories, a valid copyright of such a directory could be had. In *Callaghan v. Myers,* 128 U. S. 617, it was argued that law reports, being public property, were not susceptible of private ownership and that the reporter of the opinions was not an author and therefore could not assert a monopoly in the result of his labors. The court said (p. 647):

> "But, although there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges, *Banks v. Manchester, ante,* 244, yet there is no ground of public policy on which a reporter who prepares a volume of

8. There is no provision of the Public Utilities Act of the State of California (Cal. Stats., 1915, p. 115, Deering's Gen. Laws, 1931, Act No. 6386) requiring a telephone company to publish a telephone directory.

law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume, which will cover the matter which is the result of his intellectual labor."

Finally, appellants ignore the fundamental protection which a copyright gives to a directory proprietor, namely, the protection of the labor which the proprietor has put into his compilation.

Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 Fed. 83, recognized the proprietor was entitled to this protection (p. 88):

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work."

2. **APPELLEE'S COPYRIGHT OF ITS ALPHABETICAL TELEPHONE DIRECTORIES PROTECTS IT AGAINST THE COPYING OF THE ALPHABETICAL AS WELL AS OF THE OTHER SECTIONS OF THE DIRECTORIES.**

The appellants, it will be remembered, copied into their directories the portions of appellee's directories containing the listings of certain of its subscribers. They did not copy the introductory matter nor the classified advertising section. They contend that this being so, appellee is not protected against the copying of the alphabetical list of names, addresses and telephone numbers, claiming that "The law of copyright grants no monopoly in facts as such; but merely in the manner, form and style of presentation" (App. Br. p. 15). This argument, however, like the previous one (App. Br. p. 9), ignores the well-established rule that any directory, whether a telephone directory, a street address directory, a social directory, or a business directory, is copyrightable in its entirety.

Jeweler's Circular Pub. Co. v. Keystone Pub. Co.,
281 Fed. 83, at 87, supra;
26 A. L. R. 585, 586.

As pointed out in the annotation in 26 A. L. R. 585, it is the labor, expense and authorship which the proprietor of a directory has put into his compilation that his copyright protects. As stated in the quotation from *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.,* supra, the validity of a copyright of a directory does not depend upon literary skill or originality, either in thought or in language, but merely upon industrious collection from original sources.

We submit that *Dymow v. Bolton* (2nd C.C.A., 1926), 11 F. (2d) 690, is not a decision to the contrary. The ques-

tion there involved was whether the defendant had copied a sufficient amount of material from the plaintiff's play to make him an infringer of the plaintiff's copyright. The court was not dealing with a case like the instant one, in which admittedly all of the information in the appellants' directories came from the appellee's directories. While it is true that the names and telephone numbers in the appellants' directories have been transposed and rearranged, still all of the material therein has been copied wholly and exclusively from appellee's books and has not been procured from original sources or, as above stated, even verified. The court, in *Dymow v. Bolton,* supra, dealt with no such situation.

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3. APPELLANTS' COPYING OF MATERIAL FROM APPELLEE'S DIRECTORIES IS NOT A FAIR USE OF THEM, BUT AN INFRINGEMENT OF APPELLEE'S COPYRIGHT.

Appellants seek to avoid the charge of infringement by claiming "fair use". They concede that all of the information contained in their numerical directories was taken bodily and solely from appellee's directories by cutting the listings from the pages of appellee's directories (App. Br. p. 18). They admitted that they did not verify any of the information so taken. This, they contend, was a fair use of the material and that such use is contemplated by appellee when it publishes its directories (App. Br. p. 20).

No one of the authorities relied upon by the appellants in this connection is a case involving a directory. Whatever may be the limits of the somewhat nebulous doctrine of "fair use" as applied to ordinary literary publications,

such as texts, novels, monographs, encyclopedias, etc. (as to which it is conceivable that the reproduction of excerpts and short passages is permissible), it is submitted that this doctrine has no application to directories. The very nature of a directory is a list or enumeration of special information relating to a given subject matter, presented in a short and condensed form. The statutory privilege accorded to persons, who publish information which they have collected and classified, to obtain the exclusive right to reproduce copies of their publication, in whole or in part, would be of no value if persons, like appellants, could reproduce such compilations in whole or in part. The law condemns such practices as those in which the appellants in the case at bar have engaged.

In *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 Fed. 83, the court said (pp. 94-95):

> "The correct definition of copyright is that given by Lord Cranworth in Jefferys v. Boosey, 4 H. L. C. 815, where he said that the true definition of 'Copyright' is the sole right of multiplying copies. That means that you must not copy matter copyrighted. No one can legally take the results of the labor and expense which another has incurred in the publishing of his work, and thereby save himself 'the expense and labor of working out and arriving at those results by some independent road.' The defendant undertook to save himself the labor and expense of arriving at his results by an independent road."

Such is the situation in the instant case. Appellants copied all the information appearing in their directories from appellee's directories. They made no independent canvass of appellee's subscribers. To use the language

of the court in *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.,* supra, they undertook to save themselves the labor and expense of arriving at their results by an independent road. This they cannot do under the doctrine of fair use.

The authorities cited by appellants (App. Br. pp. 22-23), as being analogous cases of fair use, do not bear out their contentions. In no one of them is there wholesale appropriation of the copyrighted work.

In *Brief English Systems v. Owen,* 48 F. (2d) 555, the court held the plaintiff had no copyright and there was no showing of copying.

In *G. Ricordi & Co. v. Mason,* 210 Fed. 277, all the defendant did was to take "extremely brief epitomes of the plots of the two operas" which were the subject of a copyright. Obviously, in such a case there is no copying.

The court in *Whist Club v. Foster,* 42 F. (2d) 782, said that the plaintiff had no copyright on the rules of auction bridge and besides there was no showing of copying.

In *Guthrie v. Curlett,* 36 F. (2d) 694, there was no showing of copying.

The dictum from *Sampson & Murdock Co. v. Seaver-Radford Co.* (1st C.C.A., 1905), 140 Fed. 539, clearly shows that the court, in making the statement quoted by appellants (App. Br. p. 23), did not have in mind a case, as the instant one, in which all of the information was copied, but only a case in which a limited amount of information was copied. This is evident from the last sentence of the quotation (p. 542):

"So it may be that the copying and rearranging of a *general* directory for a bona fide and *limited* purpose, such as compiling a *social guide,* may come within the same rule."

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4. **INDEPENDENTLY OF ANY OTHER CONSIDERATION, THE DOCTRINE OF "FAIR USE" SHOULD NOT BE INVOKED IN CASES WHERE ITS APPLICATION WOULD RESULT IN HARM TO THE PROPRIETOR OF THE ORIGINAL WORK.**

Apart from any of the rules of law protecting the appellee in its copyrights, the evidence shows that appellee has been harmed in the past by directories such as those of the appellants and that it will be harmed in the future unless appellants are enjoined as they are by the decree in this case.

The appellants contend (App. Br. p. 27) that their directories are intended and used for an entirely different purpose from that of appellee's directories. This being so, they argue that the doctrine of fair use is applicable to the instant case.

The reasons, however, assigned by the authorities (App. Br. pp. 26-27) for the applicability of the doctrine of fair use in the case of books used for different or non-competitive purposes are (a) that the demand for the original copyrighted work will not be diminished and (b) that the profits of the original proprietor will not be prejudiced or diminished by the use of the copyrighted material in the second work. In other words, the original proprietor will not be harmed financially by the use of his material in the second publication. Although there is no evidence in this case that the demand for appellee's

directories will be diminished or that its profits from the publication of its directories will be prejudiced or diminished, it is clear from the evidence that the copying by appellants into their own books of the information from appellee's books will be harmful to appellee in the operation of its telephone business.

The record shows that this is not the first experience that appellee has had with numerical telephone directories. Many years ago there was a numerical telephone directory in San Francisco with which appellee had "quite a lot of trouble" (Tr. p. 85). A subscriber of appellee would use that directory to obtain a telephone number and the number having been reassigned to another subscriber, the latter would receive calls intended for the subscriber who originally had the number. The second subscriber would complain to appellee about erroneous calls.

The record also shows that the publication and sale of appellants' numerical directory will result in harm to appellee and annoyance to its customers unless appellants are enjoined. A spot check of 1000 listings in both the San Francisco and Oakland directories showed that the listings as they appeared in appellants' books were fourteen per cent incorrect (Tr. pp. 100-101). If a person purchased a directory from appellants he would use it, appellants say, largely for the purpose of checking telephone numbers.

Appellee's directories at all times remain its property[9] (Ex. 13—Rule and Regulation No. 20). When appellee publishes a new directory, the new directory contains all of

9. Appellee does, however, sell a limited number.

the changes in listings which have occurred in the interval between the publication of the next preceding directory and the publication of the new directory. Appellee, upon the delivery of the new directories to its subscribers, takes from them, in so far as possible, all of the old directories. Thus, the circulation of appellee's directories is more or less temporary and the information contained in them is kept, as far as possible, up to date. Appellants' directories, however, are sold by them to the public. They remain the property of the purchasers and, therefore, have a permanent circulation (Tr. p. 87).

Appellee is constantly obliged to change telephone numbers. If one of its subscribers discontinues its service, appellee reassigns that number, after an interval, to another subscriber. Furthermore, appellee may change and reassign a number due to service reasons. The number, as reassigned, would be correctly inserted in the next issue of appellee's directory. But appellants' directories, being of permanent circulation, would still contain the obsolete information after appellee had published a new directory (Tr. p. 89).

Despite the utmost care on the part of appellee there are certain errors in listings in its directories. Appellants' directories, being wholly copied from them, repeat such errors. Appellee corrects them in the next issue of its directories. Appellants' directories, however, having, as above stated, a permanent circulation, continue to contain the errors.

The inaccurate copying by appellants into their directories of the information appearing in appellee's directories and the perpetuation (after the next issue of

appellee's directories has been published) of obsolete listings, due to reassignments of numbers and to errors appearing in appellee's books, inevitably lead to the annoyance of both appellee's customers and appellee itself and cause appellee additional expense. If apellee can confine its service of intercepting calls due to persons calling numbers which have been reassigned or changed to a minimum number of calls, it can save "quite a bit in expense" as the intercepting service is an expensive one (Tr. p. 89).

The fact that the public may be annoyed and a telephone company may be caused additional expense by the copying into other directories of the information contained in the telephone company's directories, received judicial recognition in *Cincinnati & Suburban Bell Telephone Co. v. Brown* (D.C., S.D. Ohio, 1930), 44 F. (2d) 631. In that case the court issued a preliminary injunction against the defendants, restraining them from publishing their directory. The pleadings showed that the defendants had copied into their telephone directory the material from the plaintiff's telephone directory. There was evidence that the plaintiff would be harmed by the copying because it was inaccurately done. The court said (p. 632):

> "I think there is somebody else interested in this proceeding; that is, the public. It has been stated that the Telephone Company is a quasi public corporation. The telephone has ceased to be a luxury and has become a necessity in all business houses and in substantially all homes; everybody that can afford it has a telephone. Therefore, to get out a list of this kind and represent that it is an accurate list of the numbers in the telephone book, no doubt, does

lead to confusion and results in extra maintenance cost that has been referred to by the officers of the company, and it is just that much more expense that every subscriber has to pay for the maintenance of his telephone service, and, if books like these issued by defendants continued to be gotten out, more operators would have to be employed to take care of the confusion caused, and, of course, the telephone company, in order to cover this expense, along with other added expenses, would apply for higher rates, and subscribers would have to pay higher rates. I understand that this is only a drop in the bucket, but drop upon drop fills a bucket; so it is here that all these things accumulate, and it puts the burden on the public, and the telephone has become such a useful instrument that it ceases—it has long ceased to be just a matter for the convenience of a few. Everybody uses it more or less, sooner or later.''

Appellants next argue that they are entitled to use the information appearing in appellee's books for the reason that appellee's books are the original source of the information appearing therein. Nothing, however, could be further from the fact. The subscribers to appellee's telephone service are the original source of the information appearing in appellee's books. From them and from them alone appellee finds out their names and addresses. True, appellee does assign the telephone numbers to them, frequently the ones which they desire. But appellants could have obtained from the subscribers their names, addresses and telephone numbers; this, however, they did not choose to do. Instead, they adopted a method easier and more economical to them—they simply copied into their own books all of the information they wanted from appellee's books.

5. THE DISTRICT COURT PROPERLY HELD THAT DAGMAR LEON WAS LIABLE AS AN INFRINGER; SHE ACTIVELY ASSISTED IN THE COMPILATION OF APPELLANTS' DIRECTORIES, SOLD THEM TO THE PUBLIC AND OFFERED TO SELL THE BUSINESS OF APPELLANTS TO APPELLEE.

During the trial of the cause the appellant, Dagmar Leon, made a motion to dismiss the bill of complaint as to her. This the trial court denied. Its denial, we submit, was proper in view of the following evidence:

The testimony showed that Dagmar Leon, who is the wife of the appellant, Fred S. Leon, "worked right along" with him in compiling the directories and cooperated in the production of the book. She made sales of the directories over the counter at appellants' office in the Monadnock Building in San Francisco (Tr. p. 95).

More significant, however, than the testimony, is the letter (Ex. 16), mention of which is omitted from appellants' brief. It was written prior to the commencement of this suit, is addressed to Mr. A. C. Calendar, a district manager of appellee in San Francisco, on the letterhead of Numerical Telephone Directory, and is as follows:

"Dear Mr. Calendar:

Because of the fact that we are finding the financial struggle too steep and because we have been offered a price for our business as it now stands, ready to go to press, we are writing to inquire whether or not the Pacific Telephone Company would be interested in making us a bid.

The offer presented to us is 50% cash and the balance to come out of the profits on the book. We are particularly interested in receiving all cash at this time inasmuch as we have an opportunity of buying into a line of business (the pure food business) in which we have been keenly interested in get-

ting a foothold for a number of years. If immediately taken over it will give us an opportunity of preparing for the Christmas trade. It also happens that we are not the only ones interested in this particular business so we realize that we must act at once.

If the Telephone Company is interested in talking this matter over with us, we will agree to circularize our subscribers, the Better Business Bureau, Chamber of Commerce, etc, which will cover a large portion of the most important business houses in the City, giving for our reason for discontinuance whatever you advise.

We are to meet our prospective buyer on Tuesday afternoon (Oct. 1st.) for the purpose of closing the deal.

Respectfully,

Dagmar Leon."

It will be noted that throughout the letter the appellant, Dagmar Leon, continually uses the first person plural pronoun. She refers to the fact that "*we* are finding the financial struggle too steep"—"*we* have been offered a price for our business"—"*we* are writing to inquire whether or not the Pacific Telephone Company would be interested in making *us* a bid." There is only one possible construction of this letter, namely, that appellant, Dagmar Leon, considered herself as one of the proprietors of the business.

The finding of the District Court (Finding VII, Tr. p. 47) that both defendants compiled, published and sold the infringing books is, we submit, correct in view of this evidence.

CONCLUSION.

We respectfully submit that the decree of the District Court granting a permanent injunction against appellants should be affirmed for the following reasons:

1. The appellee has complied with the Copyright Act in copyrighting its directories.

2. Such directories are copyrightable.

3. The appellants infringed the appellee's copyright by admittedly copying all the material into their directories from appellee's directories without verifying it or checking it in any way.

4. The District Court properly denied the appellant's, Dagmar Leon's, motion to dismiss the bill of complaint as to her.

Dated, San Francisco,
April 5, 1937.

Respectfully submitted,
ALFRED SUTRO,
NORBERT KORTE,
SAMUEL L. WRIGHT,
Attorneys for Appellee.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

(Appendix Follows.)

Appendix.

La.

Plaintiff's Exhibit No. 15

Vol. [illegible]

ndin A M r 1537-6th Av.....LO ckhavn-4621

Cooke K S r 1431-5th Av.....LO ckhavn-4624

Cooke J G r 1431-5th Av.....LO ckhavn-4624

Allred Clifford S cl est
Main Office 2408-14th Av.....LO ckhavn-4632

Lindenmayer John H r 36 Linares...LO ckhavn-4634

Haley Michael J r 1406-7th Av...LO ckhavn-4637

McKinnon Calvin A r 1501-43rd Av.LO ckhavn-4638

Williams Lois E r 1501-43rd Av...LO ckhavn-4638

Bray W 1202 Cole.....LO ckhavn-4643

Harrold Charles Mrs r 1552-18th Av.LO ckhavn-4644

Celeste H r 52 Agua Way.....LO ckhavn-4645

Dinwiddie J E r 1691-25th Av...LO ckhavn-4646

Longmore J R r 2311-26th Av....LO ckhavn-4649

Purdum John S r 1501 Lincoln Way.LO ckhavn-4653

Fogarty Joseph F r 2551-16th Av..LO ckhavn-4656

Thompson M Mrs r 529 Kirkham...LO ckhavn-4658

Reardon Michael W r 2551-20th Av.LO ckhavn-4659

Crandall E R r 2242-9th Av.....LO ckhavn-4660

Levy Theodore M r 40 Santa Clara...LO ckhavn-4662

Phillou Edward W r 715 Ulloa....LO ckhavn-4666

Toel George E r 11 Hernandez.....LO ckhavn-4667

O'Dea M A r 1401 Irving.....LO ckhavn-4671

Schmuki B E r 1436 Moraga.....LO ckhavn-4679

Sivley Geo C r 220 Vasquez.....LO ckhavn-4680

Rowe H E Miss r 1495-7th Av....LO ckhavn-4683

Murphy Daniel J r 1392 Funston Av.LO ckhavn-4684

Cohen Jos G r 215 Vasquez.....LO ckhavn-4686

Boet Crawford Dr r 115 Terrace Dr..LO ckhavn-4690

Washington Geo r 244 Rivoli.....LO ckhavn-4692

Garrigues Fred r 225 KensingtonWay.LO ckhavn 4704

Vendt Albert Jr r 2701 Kirkham...LO ckhavn-4706

Sinclair Wm J r 1283-37th Av....LO ckhavn-4707

Robinson Reed W r 125 Terrace Dr..LO ckhavn-4709

Warden Fred r 1619-26th Av.....LO ckhavn-4711

Casnacci Edward P r 1503 29th Av.LO ckhavn-4715

Stickel Bertha Mrs r 138 Hugo...LO ckhavn-4717

Rogers Herbert r 450 Magellan....LO ckhavn-4719

Bell S Mrs r 1267-20th Av.....LO ckhavn-4725

Wiegner F L r 1495-7th Av.....LO ckhavn-4728

Johnson August r 2512-19th Av.LO ckhavn-4742

Barker G W r 100 Quintara.....LO ckhavn-4743

Wallace Lillian r 2438 Funston...LO ckhavn-4744

MacCarty Frederick L r
1 San Lorenzo Way.LO ckhavn-4746

Smith Curtis E Dr r 1 S Lorenzo Way LO ckhavn-4746

Braida Maddaline r 1342-6th Av...LO ckhavn-4747

Ross John W r 1342-6th Av.....LO ckhavn-4747

Knipscher F W r 266 Santa Paula..LO ckhavn-4748

Williams G T r 90 Lopez.....LO ckhavn-4754

Anthony J E r 39 Rockwood Court..LO ckhavn-4758

Lindenstadt B r 821 Cole.....LO ckhavn-4759

Remegie Louis P r 2143-15th Av...LO ckhavn-4765

Brandlein George O r 2015-17th Av.LO ckhavn-4767

Stone W K r 2514-26th Av.....LO ckhavn 4773

White Lloyd C r 2514-26th Av....LO ckhavn-4773

Blincoe C O r 2663-15th Av.....LO ckhavn-4775

Williams Evan C r 2659-21th Av...LO ckhavn-4782

Moore John F r 1639-25th Av....LO ckhavn-4790

Bruns J H r 74 Ventura Av.....LO ckhavn 4791

Keane H J Mrs r 206 Judah.....LO ckhavn-4793

Berire J S Mrs r 225 Castenada....LO ckhavn-4795

Giles Jennie M Mrs r 1463-19th Av LO ckhavn-4796

Ouillard John J r 2470-24th Av...LO ckhavn-4798

Van Nostrand L r 60 Ravenwood Dr. LO ckhavn-4799

Shen T T Dr r 1657-8th Av.....LO ckhavn 4800

Joyce G K r 158 Taraval.....LO ckhavn-4807

Coyne W E S r 1387 15th Av.....LO ckhavn 4810

Ramsom Eugene S r 1360-16th Av.LO ckhavn-4814

Crawford Donald A r 721 Ulloa....LO ckhavn-4819

Kane Geo P r 430 West Portal Av..LO ckhavn 4820

Pastry Palace 129 West Portal Av..LO ckhavn-4824

Clark Frank Mrs r 8 Rivoli.....LO ckhavn 4826

Umland Chas W Mrs r 2540-22ndAv.LO ckhavn-4827

Mailloux E G r 1335-30th Av....LO ckhavn-4830

Baker Fred T Mrs r 2927 LincolnWy LO ckhavn-4832

Harris Marshall C r 1401 Willard..LO ckhavn-4834

Jones Howard W r 810 Rockdale Dr.LO ckhavn-4839

Rosenthal L Mrs r 2326-32nd Av...LO ckhavn-4842

Christensen Louis H r 2515-16thAv LO ckhavn-4845

White J E r 110 Edgewood.....LO ckhavn-4848

Emge Ludwig A Dr r 109 Edgewood.LO ckhavn-4849

No. 8397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRED S. LEON and DAGMAR LEON, doing business as Numerical Directory Co.,
Appellants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),
Appellee.

APPELLANTS' REPLY BRIEF.

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ARTHUR P. SHAPRO,
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Attorneys for Appellants.

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vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),
Appellee.

APPELLANTS' REPLY BRIEF.

I. CORRECTED STATEMENT OF THE CASE.

It is stated in appellee's brief (p. 5) that the questions involved in this appeal are:

> "(a) Whether appellee's copyrights of its directories are valid, and
>
> (b) Whether appellants, by copying the information into their directories, have infringed the copyrights."

This statement is incomplete, since as set forth in the record (Assignments of Errors, Tr. pp. 105-109) and in appellant's brief (pp. 3-5), the appeal also raises the question of whether appellee offered sufficient evidence during the trial of the cause to support the ruling of the District Court in refusing to

dismiss the bill of complaint as to the appellant Dagmar Leon.

It is therefore believed that the issues raised are more accurately set forth in appellants' opening brief and reference will be made thereto in presenting this argument.

II. BENEFITS TO PUBLIC FROM USE OF NUMERICAL TELEPHONE DIRECTORY FAR OUTWEIGH ALLEGED INCONVENIENCE RESULTING FROM OBSOLESCENCE OR ERROR THEREIN.

The appellee's argument that use of appellants' numerical telephone directory would be harmful to it in the operation of its telephone business through the calling of wrong numbers (appellee's brief pp. 19-20) ignores the plain facts. The principal use of appellants' *numerical* telephone directory is not the *placing of calls.* This was plainly illustrated by the uncontradicted testimony of William E. Church, a telephone man, who said (Tr. pp. 96-97):

> "The outstanding purpose that I see for this is that most any business office, in my experience, gets quite a number of calls, when you are out of your office, to be called back. * * * with this directory I could check those calls and see whether it was some salesman or someone seeking employment, and ascertain approximately what their business was and whether it was necessary to make the return call."

Appellee's witness Woltman testified (Tr. p. 64):

> "I understand that a numerical telephone directory is used very largely for check-up on

names of somebody, some person who has called and left a number."

The appellee does not and cannot deny that appellants' numerical telephone directory is an extremely useful publication in the face of the indisputable evidence adduced at the trial.

Appellee's witness Calendar testified (Tr. p. 85):

"The numerical directory is a convenience if it contains accurate information."

Appellee's counsel admitted (Tr. p. 89) a numerical telephone directory is a useful publication, in so far as it is accurate and kept up to date.

That appellants' numerical directory is as up to date as appellee's corresponding alphabetical directory is clearly admitted by appellee. Its witness Woltman testified as follows (Tr. p. 63):

"As to the numerical telephone directory containing obsolete material the same is true of the telephone company's alphabetical directory. As to certain numbers and certain information contained therein it is obsolete the day it comes off the press."

Appellants' witness Church testified (Tr. p. 96):

"In my opinion as a telephone man the directory I hold in my hand has a very useful purpose."

In contrast to this clear and convincing proof, we have such meager evidence in support of the alleged "harm" which appellee claims will result from publication of appellants' numerical directories, that it is

apparent that the "harm" is purely imaginary. For instance, appellee's witness Woltman, under cross-examination, had this to say:

> "I cannot say absolutely whether the publication of that particular directory has been hurt in any way, or was hurt in any way by the defendants' publication of its Numerical Directories, for this reason, that when complaints are received of difficulties in placing numbers and getting calls, etc., it is our practice to straighten out the difficulty, give the customer the information, whatever the nature of the case may be, as rapidly as we can, and without questioning him. So in our complaint records the source of a complaint would not show. That is to say, whether it was a mistake in the numerical directory, or whatever it might be."

We submit that the evidence indicates that use of appellants' numerical directory would be beneficial to the public and appellee's subscribers, and the convenience thereof would far outweigh any inconvenience resulting from obsolescence or error of said publication.

III. FACTS OF PRESENT CASE DISTINGUISHED FROM APPELLEE'S PRINCIPAL AUTHORITY. (Cincinnati & Suburban Bell Tel. Co. v. Brown.)

The appellee relies in its brief (p. 21) on the decision in *Cincinnati & Suburban Bell Telephone Co. v. Brown* (D. C. S. D., Ohio, 1930), 44 Fed. (2d) 631, for support in its argument that the fact that the public may be annoyed and a telephone company *may*

be caused additional expense by the use in other directories of the information contained in the telephone company's alphabetical directories, should be taken into consideration in determining whether the use of such information is a fair use or infringement.

When the decision in *Cincinnati & Suburban Bell Telephone Co. v. Brown* is studied, it is obvious that the case turned on an entirely different point. In the first place the ruling is based only upon such proceedings as were had on the plaintiff's application to the court for a *temporary injunction.* The facts developed at that stage of the proceeding, as revealed by the decision itself, were simply these: Brown had compiled an *alphabetical* classified directory, copying in its entirety the *alphabetical* section of the plaintiff's book. The court observed, from the meager showing made on behalf of Brown, that the only purpose of publishing Brown's alphabetical telephone directory was to sell advertising space therein and *it had no useful purpose.* Consequently, the book published by Brown merely duplicated the use of the telephone company's alphabetical directory, and obviously supplanted the use of the same in some degree. That the Brown directory was a poor copy of the original was also deemed an important factor. These facts are apparent from the following language used by the court:

> "The defendants—I have no criticism to offer as to either of them—perhaps if they had been here might have been able to throw some light on the situation. It seems reasonable to suppose that these lists of names and addresses have

> been taken by defendants from the directory of the telephone company. *They* do not contain any new numbers, and *are no aid to the public or to the subscribers. They do not seem to me to be of any assistance to anybody, save only as mediums of advertising for such profit as these defendants can make out of them.* There is nothing unlawful in that; they have a right to advertise, but without some explanation from them, or without somebody who can speak for them (and Mr. Allen cannot do that as he has not been informed), I think the court should issue an injunction." (Italics supplied.)

Nevertheless, and notwithstanding these facts, the court seemed extremely doubtful that the telephone company in that case was entitled to injunctive relief against the copying of portions of the alleged copyrighted alphabetical telephone directory, for we read (p. 632):

> "Whether or not, strictly speaking the telephone company is entitled, under the strict rules of copyright law, to this (preliminary) injunction, I am not going to pass on it at this time." (Matter in parentheses supplied.)

In so far as the reports show there never was a trial on the merits of the controversy between the parties to *Cincinnati & Suburban Bell Telephone Co. v. Brown.*

There is no such resemblance between the directories in the case at bar as in the *Cincinnati & Suburban Bell Telephone Co. v. Brown,* for the simple and obvious reason that here the books are diametri-

cally opposed in purpose, textual matter and, necessarily, arrangement. As has been heretofore pointed out, the primary use of an alphabetical telephone directory is to determine the telephone number of a particular person, as an aid to placing a telephone call, while the primary purpose of a numerical telephone directory is to determine the identity of the subscriber to a particular telephone number. Although the information to be gleaned from a numerical directory may be utilized in placing a call, that is not necessarily its most beneficial or important use.

We submit that appellee finds no support for its contentions in *Cincinnati & Suburban Bell Telephone Co. v. Brown,* supra.

IV. DOCTRINE OF FAIR USE WELL SETTLED IN COPYRIGHT LAW, ACCORDING TO APPELLEE'S OWN ADMISSION.

The position of the appellee in response to the argument that the doctrine of fair use is applicable to the facts of the case at bar, is a little difficult to grasp. At page 15 of its brief appellee speaks of this principle of law as "somewhat nebulous", while on page 18 of its brief a good, terse statement of the rule is given to preface a poor attempt to show inapplicability to the facts in this case. We quote from appellant's brief, page 18:

> "The reasons, however, assigned by the authorities (App. Br. pp. 26-27) for the applicability of the doctrine of fair use in the case of books used for different or non-competitive purposes are (a) that the demand for the original copy-

> righted work will not be diminished and (b) that the profits of the original proprietor will not be prejudiced or diminished by the use of the copyrighted material in the second work."

We agree that this is a proper statement of the rule of fair use and we think its applicability could not be made plainer than by the following statement appearing at pages 18-19 of appellee's brief:

> "*Although there is no evidence in the case that the demand for appellee's directories will be diminished or that its profits from the publication of its directories will be prejudiced or diminished,* it is clear from the evidence that the copying by appellants into their own books of the information from appellee's books will be harmful to appellee in the operation of its telephone business." (Italics supplied.)

We contend, on behalf of the appellants, that the appellee admits the doctrine of fair use is applicable and controlling in this case and the force of the admission is not lessened by appellee's attempt to misfit the proven facts to the rule. It is said (appellee's brief p. 18, quoted above) that:

> "* * * it is clear from the evidence that the copying by appellants into their own books of the information from appellant's books will be harmful to appellee in the operation of its telephone business."

but it is to be noted that the evidence referred to is so unsatisfactory and meager as to leave no doubt but the alleged "harm" is purely feigned.

Appellee first refers to "quite a lot of trouble" which is alleged to have been caused by a numerical telephone directory in San Francisco many years ago. (Appellee's brief p. 19.) Unfortunately, we are not acquainted with history of the older publication, but suffice is to say that the naked reference thereto by appellant's witness Calendar (Tr. p. 85) does not prove that by publication or use of appellants' numerical directories, appellee has been harmed.

It is also proper to observe, we think, that it is the financial harm to the proprietor of the first or copyrighted book *in the business of selling that book* (as by lessening of sales) which the law aims to protect, not some indirect and inconsequential or trifling harm not affecting the proprietor's revenue from his work.

DeWolfe, On Outline of Copyright Law, pp. 142-143;

Weil, Law of Copyrights, Section 1135.

While appellee refers (appellee's brief pp. 19-20) to errors in appellant's numerical telephone directories as a source of harm to it in the operation of its telephone business, it cannot be heard to say that with or without a few errors, a numerical directory will diminish the demand for its alphabetical telephone directory, or prejudice its profits, or supersede the objects of the original work. As between an alphabetical telephone directory and a numerical telephone directory we believe all else is immaterial.

CONCLUSION.

In closing, we think it only fitting and proper to point out again that in so far as appellants have been able to determine by exhaustive research, this is a case of first impression. It is apparent that the appellee concurs in the conclusion since its brief is devoid of authority passing on issues such as we have in the case at bar. An interesting fact is that so recent a text as *Amdur, Copyright Law and Practice* (1936 Edition) (published after this suit was instituted) confirms the lack of precedent by citing none.

However, it is thought, and therefore respectfully contended (in the event that, over our objection, this court upholds the validity of appellee's copyrights), that the publication of a *numerical* telephone directory, compiled from the lists of names and telephone numbers of a copyrighted *alphabetical* telephone directory is a *fair use* of such material and not an infringement of the copyright.

Wherefore, it is respectfully urged that the judgment of the District Court may be reversed in order that justice may be done in the premises.

Dated, San Francisco,
April 30, 1937.

Respectfully submitted,
JAS. M. NAYLOR,
ARTHUR P. SHAPRO,
Attorneys for Appellants.

8459

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

J. N. HENDRICKSON,

Complainant,

vs.

EL CAMINO OIL COMPANY, LTD., a corporation,

Respondent.

STATE OF CALIFORNIA,

Creditor and Appellant,

vs.

H. A. MEEK, as Receiver of the El Camino Oil Company, Ltd., a corporation,

Receiver and Appellee,

F. R. KENNEY and L. W. WICKES,

Creditors and Appellees.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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UNITED STATES OF AMERICA, SS.

TO H. A. MEEK, as Receiver of the El Camino Oil Company, Ltd., a corporation, and to F. R. KENNEY AND L. W. WICKES, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of October, A. D. 1936, pursuant to an order allowing the State of California an appeal, of record in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled J. N. Hendrickson, Complainant, vs. El Camino Oil Company, Ltd., a corporation, Respondent, wherein the State of California is creditor and appellant and you are, respectively, receiver and appellee, and creditors and appellees, to show cause, if any there be, why the order appealed from by said State, as in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable George Cosgrave, United States District Judge for the Southern District of California, this 30th day of September, A. D. 1936, and of the Independence of the United States, the one hundred and sixty-first.

Geo. Cosgrave
U. S. District Judge for the Southern District of California.

[Endorsed]: Received copy of the within Citation and copies of Assignment of Errors, Petition for Appeal, Order Allowing Appeal, filed herein this 30th day of Sept 1936. Earl Glen Whitehead Attorney for H. A. Meek, Receiver. A. Maxson Smith Attorney for F. R. Kenney & L. W. Wickes Filed Sept. 30, 1936 R. S. Zimmerman, Clerk, by Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

J. N. HENDRICKSON, Complainant, vs. EL CAMINO OIL COMPANY, LTD., a corporation, Respondent.	NO. W-21-C PETITION FOR ORDER TO SHOW CAUSE WHY CLAIM FOR TAXES SHOULD NOT BE ALLOWED AS A PREFERRED CLAIM.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The petition of the People of the State of California, by and through the Attorney General of said state, claimant in the above entitled action, respectively represents:

I.

That the said State of California heretofore duly filed with the receiver in the above entitled cause its claim against the above named respondent for taxes due said state in the sum of Two Hundred Ninety-one Thousand Twenty-five and 23/100 ($291,025.23) Dollars on account of gasoline sold by respondent as a distributor in said State of California; that the laws of said state provide that such tax shall be a lien upon all property of the distributor, attaching at the time of delivery or distribution subject to said license tax, having the effect of an execution duly levied against all property of the distributor, and remaining until the license tax is paid or the property sold in payment thereof; that said claim was filed as a

preferred claim and as being a lien on the property of the respondent, all as set forth in said claim so filed with the receiver herein.

II.

That said receiver, through his counsel, has refused to allow said claim as a preferred or lien claim, or at all, notwithstanding the provisions of law making the same a preferred claim and creating a lien therefor.

III.

That your petitioner is informed and believes and therefore alleges that said receiver has on hand cash which is not required in the operation of said respondent corporation herein.

WHEREFORE, your petitioner prays that this court order said receiver to show cause, if any he has, in this court, at an hour and on a date to be appointed by the court, why he should not allow said claim as a preferred claim and as a lien claim prior to the claims of other creditors of the respondent, and why he should not distribute to the State of California on account of said claim the cash now in his hands and available for distribution, and for such other and further orders as to the court may seem just and proper in the premises.

U. S. WEBB,
Attorney General,
By John O. Palstine
Deputy Attorney General.
Attorneys for and on behalf of the People of the State of California.

[Endorsed]: Filed Feb. 28, 1935 R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER TO SHOW CAUSE WHY PREFERRED CLAIM OF STATE OF CALIFORNIA FOR TAXES SHOULD NOT BE ALLOWED AND DISTRIBUTION MADE TO SAID STATE.

Upon reading and filing the petition of the State of California for an order that the receiver in the above entitled action show cause before this court why he should not allow a certain claim for taxes filed by said state as a preferred and lien claim and why he should not distribute to said state on account of said claim the moneys in his hands available for distribution, and good cause appearing therefor,

IT IS ORDERED that H. A. Meek, receiver in the above entitled action, show cause, if any he has, before this court at 2 o'clock P. M. on the 11th day of March, 1935, or as soon thereafter as the matter can be heard by the court, in the courtroom of the Honorable Geo. Cosgrave, United States District Judge, in the Federal Building, Los Angeles, California, why the claim of the State of California for taxes heretofore filed with the said H. A. Meek, receiver, should not be allowed as a preferred claim and as a lien against the assets of the above named respondent, to be paid prior to claims of other creditors of the said respondent, and to then and there show cause, if any he has, why he should not distribute to said State of California on account of said

claim the moneys now in his hands and available for distribution.

IT IS FURTHER ORDERED that the petitioner, the People of the State of California, shall give ..... days notice of this order to show cause, to the said receiver and the said respondent, by the service of a copy of the petition upon which this order is made and a copy of this order on the said receiver and respondent, or their counsel of record herein.

Dated: February 28, 1935.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Feb. 28, 1935 R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ANSWER TO ORDER TO SHOW CAUSE WHY PREFERRED CLAIM OF STATE OF CALIFORNIA FOR TAXES SHOULD NOT BE ALLOWED AND DISTRIBUTION MADE TO SAID STATE AND TO THE PETITION FOR SUCH ORDER TO SHOW CAUSE.

Comes now H. A. MEEK, Receiver for the above named respondent and answering the petition of the State of California for an order to show cause admits, denies and alleges as follows, to-wit:

I.

Admits that the State of California duly filed a claim in the above entitled matter against the above named respondent for taxes alleged to be due from said respondent to the State of California. Admits that the amount claimed by the State of California as disclosed by the said claim filed is the sum of Two Hundred Ninety One Thousand Twenty Five and 23/100 ($291,025.23) Dollars, but denies that the said sum so claimed is the true and correct amount of the alleged tax and penalty due, and in that connection alleges as disclosed by the records of the respondent the correct amount of taxes and penalties that should have been claimed by the State of California amounts to the sum of Two Hundred Eighty Three Thousand Fifty Two and 43/100 ($283,052.43) Dollars. Alleges that of said sum of Two Hundred Eighty Three Thousand Fifty Two and 43/100 ($283,052.43) Dollars, the sum of Thirty One Thousand Fifty One and 36/100 ($31,051.36) Dollars is allegedly due as penalties on unpaid tax and that the sum of Two Hundred Fifty Two

Thousand One and 07/100 ($252,001.07) Dollars is due to the State of California as and for unpaid balance of taxes.

II.

Admits that the law of the State of California purports to make said taxes a lien as set forth in Paragraph I of the petition of the State of California, but further alleges that said law does not provide that the same shall be a first lien, and that the Receiver is informed and believes that any lien created pursuant to the Gasoline Tax Law of the State of California is subsequent and subordinate to valid existing encumbrances.

III.

Answering Paragraph II of the petition of the State of California, the Receiver denies that he has refused to allow said claim of the State of California or to pass thereon and alleges that negotiations have been pending with the possible view of settling the rights of the State and the rights of the other lien holders as to the properties of the respondent company, and that it now appearing that no settlement is possible, the Receiver did in a report filed with the above entitled Court on March 12, 1935, set forth his ruling as to the claim of the State of California and did in said report set forth facts found by the Receiver in connection with the respective claim of the State of California and F. R. Kenney and L. W. Wickes as hereinafter set forth, to-wit:

On June 10, 1930, a trust deed was recorded which had been executed June 7, 1930, which was by the El Camino Oil Company, Ltd. as Trustor with F. R. Kenney and L. W. Wickes as Beneficiaries. This trust deed conveyed title to all properties of the El Camino Oil Company, Ltd.

at the refinery and at the bulk plant to the Title Insurance and Trust Company pursuant to the terms of the said trust agreement for the purpose of securing payment to the said beneficiaries of certain moneys due them as and for crude oil purchased by the El Camino Oil Company, Ltd. which amounted to approximately Ninety Thousand ($90,000.00) Dollars. At this time there was nothing of record to show any liens superior to the said trust deed, which was given for a valuable and adequate consideration and in good faith. That thereafter certain interest has accrued in connection with the trust deed, all of which is secured by the said trust deed. The beneficiaries under the trust deed therefore claim a prior right in and to all properties of the El Camino Oil Company, Ltd. as security for the moneys due them.

The State of California has filed a claim with your Receiver amounting to the sum of Two Hundred Eighty Three Thousand Fifty Two and 43/100 ($283,052.43) Dollars, claiming said sum to be due as unpaid gasoline tax together with penalties. Said tax allegedly accrued under the terms of the Gasoline Tax Act of 1927 of the State of California. That attached hereto and made a part hereof and marked Exhibit "B" is a memorandum of delinquent gasoline tax showing due dates, payment and penalties which has been compiled from the records of the El Camino Oil Company, Ltd. which show that the unpaid tax amounts to the sum of Two Hundred Fifty Two Thousand One and 07/100 ($252,001.07) Dollars, and the penalties claimed amounting to the sum of Thirty

One Thousand Fifty One and 36/100 ($31,051.36) Dollars. That the records further disclose that at the time the said trust deed was executed and recorded there was due tax in the sum of Sixty Five Thousand ($65,000.00) Dollars, which tax was subsequently reduced by series of payments leaving a balance unpaid of Sixteen Thousand Three Hundred Seventy Four and 61/100 ($16,374.61) Dollars. That the said tax as to which there is an unpaid balance of Sixteen Thousand Three Hundred Seventy Four and 61/100 ($16,374.61) Dollars became due on May 15, 1930. A tax in the sum of Ninety Two Thousand Seven Hundred Seventy Seven and 19/100 ($92,777.19) Dollars accrued as of June 30, 1930, which was payable August 15, 1930. Certain other taxes accrued which brings the total unpaid tax to the sum of Two Hundred Fifty Two Thousand One and 07/100 ($252,001.07) Dollars. That the said figure of Two Hundred Fifty Two Thousand One and 07/100 ($252,001.07) Dollars does not take into consideration the penalties claimed, nor does the said sum of Sixteen Thousand Three Hundred Seventy Four and 61/100 ($16,374.61) Dollars take into consideration money claimed as a penalty by the State of California. That as to the penalties claimed by the State, the Receiver rejects and disallows them in full. That as to the said sum of Sixteen Thousand Three Hundred Seventy-Four and 61/100 ($16,374.61) Dollars, which tax accrued and was due and unpaid prior to the time of the recording of the trust deed referred to, the Receiver approves this sum as a preferred claim and recommends that

the Court authorize and approve the payment of this sum immediately from funds now in the possession of the Receiver. That as to the tax claim of the State of California in the sum of Two Hundred Thirty Five Thousand Six Hundred Fifty Three and 46/100 ($235,653.46) Dollars, which is the remainder after the payment of the sum of Sixteen Thousand Three Hundred Seventy Four and 61/100 ($16,374.61) Dollars, the Receiver approves and allows the same as prior to the claims of the general creditors. That as heretofore ruled, the claim of F. R. Kenney and L. W. Wickes is a secured claim upon all properties of the Respondent Company, and that the rights of the said secured claimants in and to such properties are superior to the claim of the State of California, and that the claim of the State of California, if secured by any lien on the properties of the respondent company, is subject to the prior lien of the said F. R. Kenney and L. W. Wickes. That it is immaterial whether the claim of the State of California is secured or not inasmuch as it is the only prior claim and any moneys received by reason of the sale of the properties of the respondent company in excess of the claim of F. R. Kenney and L. W. Wickes, or other moneys, would be paid to the State of California by reason of priority of the State's claim before any funds could be disbursed to general creditors. That as heretofore pointed out, your Receiver and his attorney have engaged in several conferences with the representatives of the State of California in an effort to amiably adjust and determine the rights of the State of California in relation to the

said trust deed beneficiaries and have likewise engaged in several conferences with representatives of the trust deed beneficiaries. However, it has been definitely determined that it is impossible to submit any plan to the Court which would be satisfactory to all parties concerned. That the reason such plan is impossible is due to the fact that the Attorney General's Office of the State of California has ruled that it is impossible for the State to legally compromise or adjust any claims, even though the result might benefit the State.

IV.

Receiver further alleges as hereinbefore set forth and as was set forth in the Receiver's report that the Receiver has on hand certain moneys which are not necessary for the operation of the above named respondent corporation, and the Receiver recommends that he be authorized to pay to the State of California the sum of Sixteen Thousand Three Hundred Seventy Four and 61/100 ($16,374.61) Dollars.

WHEREFORE, your Receiver prays that this Court dismiss the order to show cause heretofore issued in connection with the above entitled matter and for such other and further relief as to the Court may seem just and proper in the premises.

H. A. Meek
Receiver

Earl Glen Whitehead
Attorney for Receiver

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

H. A. MEEK, being by me first duly sworn, deposes and says: That he is the Receiver in the above entitled matter; that he has read the foregoing Answer To Order To Show Cause Why Preferred Claim of State of California For Taxes Should Not Be Allowed And Distribution Made To Said State And To The Petition For Such Order To Show Cause and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters, that he believes it to be true.

H. A. Meek

Subscribed and sworn to before me this 19 day of March, 1935.

[Seal] Earl Glen Whitehead

Notary Public in and for said County and State.

[Endorsed]: Filed Mar. 20, 1935 R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk

[Title of Court and Cause.]

STIPULATED STATEMENT OF FACTS

IT IS HEREBY STIPULATED between the receiver for the above named company, and the People of the State of California, by and through the Attorney General of said State:

I.

That during all of the year 1930, and to and including April 7, 1931, said El Camino Oil Company, Ltd. was engaged in the business of refining, manufacturing, producing and compounding motor vehicle fuel in the State of California and selling the same in said State, and as such was subject to a motor vehicle fuel tax pursuant to the provisions of California Statutes 1923, p. 5719, as amended, and California Statutes 1927, p. 1565.

II.

That there was duly and regularly assessed by the State of California against said distributor pursuant to said Acts, and after March 31, 1930, a motor vehicle fuel tax in the sum of One Hundred Two Thousand Two Hundred Twenty and 90/100 ($102,220.90) Dollars, for the first quarter of said year 1930, ended March 31, 1930; that said tax became delinquent at five o'clock P. M. on the 15th day of May, 1930, at which time a Ten (10%) Per Cent penalty in the amount of Ten Thousand Two Hundred Twenty Two and 09/100 $10,222.09) Dollars was added to said tax as provided in said Acts, and was entered upon the assessment roll by the Controller of the said State of California.

III.

That there was duly and regularly assessed by the State of California against said distributor pursuant to said Acts, and after June 30, 1930, a motor vehicle fuel tax in the sum of Ninety Two Thousand Eight Hundred Sixty Nine and 11/100 ($92,869.11) Dollars for the second quarter of 1930, ended June 30, 1930; that said tax became delinquent at five o'clock P. M. on the 15th day of August, 1930, at which time a Ten (10%) Per Cent penalty in the amount of Nine Thousand Two Hundred Eighty-Six and 91/100 ($9,286.91) Dollars was added to said tax as provided in said Acts, and was entered upon the assessment roll by said Controller.

IV.

That there was duly and regularly assessed by the State of California against said distributor pursuant to said Acts, and after September 30, 1930, a motor vehicle fuel tax in the sum of Forty Five Thousand Six Hundred Four and 88/100 ($45,604.88) Dollars for the third quarter of 1930, ended September 30, 1930; that said tax became delinquent at five o'clock P. M. on the 15th day of November, 1930, at which time a Ten (10%) Per Cent penalty in the amount of Four Thousand Five Hundred Sixty and 49/100 ($4,560.49) Dollars was added to said tax as provided in said Acts, and was entered upon the assessment roll by said Controller.

V.

That there was duly and regularly assessed by the State of California against said distributor pursuant to said Acts, and after March 31, 1931, a motor vehicle fuel tax in the sum of Ninety Seven Thousand Five Hundred

Seventy One and 72/100 ($97,571.72) Dollars for the first quarter of 1931, ended March 31, 1931; that at five o'clock P. M. on the 15th day of May, 1931, the sum of Ninety Five Thousand Three Hundred Fifty Four and 20/100 ($95,354.20) Dollars of said tax became delinquent, at which time a Ten (10%) Per Cent penalty in the amount of Nine Thousand Five Hundred Thirty Five and 42/100 ($9,535.42) Dollars was added to said tax as provided in said Acts, and was entered upon the assessment roll by said Controller.

VI.

That since May 15, 1930, the following sums have been paid to the State of California by said El Camino Oil Company, Ltd. on the following dates:

May 27, 1930	$22,220.90
June 2, 1930	5,000.00
June 3, 1930	5,000.00
June 11, 1930	5,000.00
June 16, 1930	5,000.00
July 1, 1930	10,000.00
July 15, 1930	10,000.00
July 22, 1930	5,000.00
Nov. 20, 1930	1,000.00
Nov. 22, 1930	1,000.00
Apr. 15, 1931	2,217.49
May 29, 1931	2,895.33
June 9, 1931	1,320.00
July 31, 1931	1,288.09
Aug. 7, 1931	1,137.73
Sept. 19, 1931	1,642.60
Oct. 14, 1931	1,563.30
Nov. 11, 1931	2,036.43
Dec. 12, 1931	935.00
Jan. 11, 1932	1,589.42

That no other payments have been made on account of the aforesaid taxes and penalties. That all of said payments except the aforesaid payments made on April 15, 1931, and on May 29, 1931, were made to the State Controller of the State of California without instructing the said Controller as to how said sums should be applied upon the indebtedness of said company to the State of California; that said State Controller credited said sums so paid without instructions as to their application, upon the assessment roll showing the tax and penalty for the aforesaid first quarter of the year 1930; that there was thus credited the total sum of Eighty Thousand Seven Hundred Thirty Three and 47/100 ($80,733.47) Dollars; that said State Controller did not designate upon said *said* assessment roll whether said payments were credited upon said penalty item or upon said principal tax items shown upon said roll.

That said payments of April 15, 1931, and May 29, 1931, in the total sum of Five Thousand One Hundred Twelve and 82/100 ($5,112.82) Dollars, were made to the State Controller of the State of California with instructions to apply the same on account of said aforesaid tax assessed for the first quarter of the year 1931; that said State Controller credited said payments in the total sum of Five Thousand One Hundred Twelve and 82/100 ($5,112.82) Dollars upon the assessment roll showing the tax and penalty for the aforesaid first quarter of the year 1931; that no payments have been made or credited on account of the aforesaid taxes or penalties thereon for the second and third quarters of the year 1930.

VII.

That on and prior to the 7th day of June, 1930, said El Camino Oil Company, Ltd. was indebted to F. R. Kenney and L. W. Wickes for crude oil theretofore purchased under the terms of a written contract, and that on or about June 7, 1930, said El Camino Oil Company, Ltd. made, executed and delivered two promissory notes in the amounts of Eighty Thousand ($80,000.00) Dollars and Ten Thousand ($10,000.00) Dollars respectively, payable to F. R. Kenney and L. W. Wickes on demand and bearing interest at Seven (7%) Per Cent per annum compounded quarterly. That copies of said notes together with the instruments securing the same are attached hereto and made a part hereof. That for the purpose of securing payment to said F. R. Kenney and L. W. Wickes of the moneys due them as evidenced by said Eighty Thousand ($80,000.00) Dollars promissory note, a trust deed was made, executed and delivered by said El Camino Oil Company, Ltd. on said 7th day of June, 1930, conveying to the Title Insurance and Trust Company title to the property as set forth in the said trust deed, a copy of which is attached hereto; that said trust deed was recorded on June 10, 1930, in Book 10022, page 233 of Official Records of the County Recorder's office of Los Angeles County. That said Ten Thousand ($10,000.00) Dollars promissory note was secured by a chattel mortgage made, executed, and delivered by said El Camino Oil Company, Ltd. on or about said 7th day of June, 1930, covering and mortgaging certain trucks and equipment as more particularly set forth in said mortgage, a copy of which is attached hereto. That at the time said instruments were made, executed, and delivered, the exact balance due said F. R. Kenney and L. W. Wickes from

the El Camino Oil Company, Ltd. was not known, said crude oil contracts being "realization contracts", but said notes and securities were made in the aforesaid amounts in order to amply cover the indebtedness which would thereafter be fixed by said parties; that thereafter an accounting was had whereby it was determined that as of said 7th day of June, 1930, said El Camino Oil Company, Ltd. was indebted to said F. R. Kenney and L. W. Wickes in the sum of Seventy Eight Thousand Forty Six and 60/100 ($78,046.60) Dollars only.

VIII.

That from the 1st day of April, 1930, to and including the 6th day of June, 1930, said El Camino Oil Company, Ltd. refined, manufactured, produced, and compounded two million three hundred seventy four thousand four hundred sixty one (2,374,461) gallons of motor vehicle fuel in the State of California and sold the same in said state, which sales were taxable under the provisions of said California Motor Vehicle Tax Acts, and which sales, together with the other taxable sales by said company during said quarter, were thereafter, and after June 15, 1930, pursuant to the provisions of said acts, reported by said El Camino Oil Company, Ltd. to the State Board of Equalization of said state; that thereafter and pursuant to said acts and after June 15, 1930, a motor vehicle fuel tax in the amount of Ninety Two Thousand Eight Hundred Sixty Nine and 11/100 ($92,869.11) Dollars was duly and regularly assessed against said El Camino Oil Company, Ltd. upon the basis of said motor vehicle fuel refined, manufactured, produced, and compounded by said company and sold by it in said State of California during said second quarter of 1930; that of said tax so assessed

in the sum of Ninety Two Thousand Eight Hundred Sixty Nine and 11/100 ($92,879.11) Dollars, the sum of Seventy Thousand *Four* Hundred Twenty One and 49/100 ($70,521.49) Dollars was based upon said sales and distributions made during the period from April 1, 1930, to and including June 6, 1930, as aforesaid.

IX.

That from the 1st day of April, 1930, to and including the 9th day of June, 1930, said El Camino Oil Company, Ltd. refined, manufactured, produced, and compounded two million four hundred ninety one thousand seven hundred forty three (2,491,743) gallons of motor vehicle fuel in the State of California and sold the same in said state, which sales were taxable under the provisions of said California Motor Vehicle Tax Acts, and which sales, together with the other taxable sales by said company during said quarter, were thereafter, and after June 15, 1930, pursuant to the provisions of said acts, reported by said El Camino Oil Company, Ltd. to the State Board of Equalization of said state; that thereafter and pursuant to said acts, and after June 15, 1930, a motor vehicle fuel tax in the amount of Ninety Two Thousand Eight Hundred Sixty Nine and 11/100 ($92,879.11) Dollars was duly and regularly assessed against said El Camino Oil Company, Ltd. upon the basis of said motor vehicle fuel refined, manufactured, produced, and compounded by said company and sold by it in said State of California during said second quarter of 1930; that of said tax so assessed in the sum of Ninety Two Thousand Eight Hundred Sixty Nine and 11/100 ($92,879.11) Dollars, the sum of Seventy Four Thousand Four and

77/100 ($74,004.77) Dollars was based upon said sales and distributions made during the period from April 1, 1930, to and including June 9, 1930, as aforesaid.

X.

It is further stipulated that all assessments made by the State of California against the El Camino Oil Company, Ltd. as hereinbefore set forth, were duly and regularly made by the State Board of Equalization which prepared and completed an assessment roll showing the amount of the license tax assessed against each distributor. That immediately thereafter said Board of Equalization delivered said asssessment roll to the State Controller. That a true copy of the assessment rolls showing the assessments made against the El Camino Oil, Ltd., as aforesaid are attached hereto and made a part hereof.

It is further stipulated that the description of no property was at any time set forth on any of said assessment rolls.

XI.

It is further stipulated that on May 29, 1931, there was filed in the Superior Court of the State of California, in and for the County of Los Angeles, an action entitled The People of the State of California, Plaintiff, vs. El Camino Oil Company, Ltd., Defendant, said action being numbered 322375, and said action being filed for the purpose of recovering moneys alleged to be due from the defendant therein to the State of California as and for unpaid taxes due upon sales of gasoline made by the defendant therein. That a true copy of the said complaint is attached hereto and made a part hereof.

XII.

That thereafter, and on or about June 30, 1931, a stipulation was entered into in connection with the above referred to Superior Court action, a copy of which is attached hereto and made a part hereof. That said stipulation has not been filed in said action nor has any judgment been given or entered pursuant thereto.

XIII.

It is further stipulated that in stipulating to the foregoing facts, neither party hereto is stipulating as to the legal effect of said facts, and it is further stipulated that additional evidence may be introduced by either party in the event the same is material and appurtenant to the issues.

DATED: May , 1935.

U. S. Webb, Attorney General
By John O. Palstine, Deputy
Earl Glen Whitehead
Attorney for the Receiver

CHATTEL MORTGAGE

THIS MORTGAGE made this 6th day of June, 1930, by EL CAMINO OIL COMPANY, LTD., a Nevada corporation, with its principal place of business in the city of Los Angeles, state of California, to F. R. KENNEY and L. W. WICKES, of the city and county of Los Angeles, state of California,

WITNESSETH:

That the said Mortgagor mortgages to the said Mortgagees all that certain personal property situated in the county of Los Angeles and described as follows:

Make and Description		Engine No.	Purchased From	1930 California License No.
Ford	Stake Body Truck	14579703	El Camino Oil Co.	6P33-87
G. M. C.	3-Compartment Tank Truck	2053207	" " " "	PcC98-01
Republic	3-Compartment Tank Truck	CT 21636	" " " "	PcD82-00
Dodge	Delivery Body	A 262067	Tucker & Fagan	2X3355
Ford	Compartment Tank Truck	AA2280844	Pacific Oil & Ref. Co.	PcB26-91
G. M. C.	4-Compartment Tank Truck	845002	El Camino Oil Co.	PcC99-19
G. M. C.	4-Compartment Tank Truck	893444	" " " "	PcC9803
Sterling	1-Compartment Tank Truck	192979	" " " "	PcD8199
Utility	1-Compartment Tank Trailer	6757	" " " "	PT39-572
Sterling	1-Compartment Tank Truck	13106	" " " "	PcC98-02
Sterling	1-Compartment Tank Truck	203692	Sterling Motor Tr.	PcD81-98
Utility	1-Compartment Tank Trailer	6977	Utility Trailer Sales	PT39573
Nash	Cabriolet	A38808	El Camino Oil Co.	6P33-83
Nash	Coupe	353157	" " " "	— — —
Ford	Light Delivery Body	A2388899	Hubbard Auto Sales	6P3386
Ford	Standard Coupe	A2334193	" " "	6P3385
Ford	Sport Coupe	A2638816	Noll Auto Co.	4V 64-48
Ford	Standard Coupe	A2706089	" " "	4V 65-41
Ford	Standard Coupe	A2870480	" " "	— — —

as security for the payment to said F. R. Kenney and said L. W. Wickes, the said Mortgagees, of $10,000.00 gold coin of the United States of America, with interest at the rate of 7% per annum according to the terms and conditions of a certain Promissory Note of even date herewith and in words and figures as follows, to-wit:

$10,000.00 Los Angeles, California, June 6th, 1930.

On demand, for value received, I, El Camino Oil Company, Ltd., a corporation, promise to pay to F. R. Kenney and L. W. Wickes, or order, at Los Angeles, California, the sum of Ten Thousand Dollars, with interest at the rate of seven per cent. (7%) per annum from date until paid, interest payable quarterly and if not so paid, to be compounded quarterly and bear the same rate of interest as the principal. Principal and interest payable in gold coin of the United States. If suit or action shall be instituted in any court to collect any sum becoming due on this note, the undersigned promises to pay such sum as the court may adjudge reasonable as attorney's fees in said court or action. This note is secured by a chattel mortgage of even date herewith.

EL CAMINO OIL COMPANY, LTD.,
By Joseph M. Devere
President

[Corporate Seal]

By Alfred Barstow
Secretary

It is also agreed that if the mortgagor shall fail to make any payment as in the promissory note provided, then the mortgagees may take possession of the said personal prop-

erty, using all necessary force so to do and may immediately proceed to sell the same in the manner provided by law and from the proceeds pay the whole amount of said note specified or so much of the same as said proceeds will pay and all costs of sale, including reasonable counsel fees in an amount to be fixed by Court, paying the overplus to the said mortgagor, all of said costs, including said counsel fees, being hereby secured.

The said mortgagor does hereby state, declare and warrant that it is the sole and separate owner of all the within mentioned personal property and that there are no liens or encumbrances or adverse claims of any kind whatever on any part thereof, except as follows:

Make	1930 California License No.				Amount
Ford & Paint Compr. Outfit	6P33-87	Subject to contract		C. I. T. Corporation	$ 219.70
Ford	PcB26-91	"	"	Comm'l Credit Co.	429.00
Sterling	PcD8199	"	"	Sterling Motor T. Co.	1,890.56
Utility Trailer	PT39-572	"	"	Utility Trailer S. Co.	664.05
Sterling	PcC98-02	"	"	Sterling Motor T. Co.	1,575.69
Sterling	PcD81-98	"	"	Sterling Motor T. Co.	4,176.00
Utility Trailer	PT39573	"	"	Utility Trailer S. Co.	2,959.28
Ford Sport Coupe	4V 64-48	"	"	Noll Auto Co.	441.00
Ford Standard Coupe	4V 65-41	"	"	" " "	441.00
Ford Standard Coupe		"	"	" " "	497.76

IN WITNESS WHEREOF, the said El Camino Oil Company, Ltd., a corporation, the foregoing mortgagor, has executed this chattel mortgage by its president and secretary and said secretary has affixed its corporate seal hereto, being first thereunto duly authorized, the day and year first hereinabove mentioned.

EL CAMINO OIL COMPANY, LTD.,
By (Signed) Joseph M. Devere
President
By (Signed) *Af*red Barstow
Secretary

STATE OF CALIFORNIA,)
) SS.
County of Los Angeles.)

On this 6th day of June, A. D. 1930, before me, MARGARET HOWLETT, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared JOSEPH M. DEVERE, known to me to be the President, and ALFRED BARSTOW, known to me to be the Secretary of the El Camino Oil Company, Ltd., the corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Signed) Margaret Howlett
My Commission Expires March 28, 1934
[Seal] Notary Public in and for said County and State

STATE OF CALIFORNIA,)
) SS.
County of Los Angeles.)

JOSEPH M. DEVERE and ALFRED BARSTOW each for himself deposes and says that the said JOSEPH M. DEVERE is the president and the said ALFRED BARSTOW is the secretary of the El Camino Oil Company, Ltd., a party to the within instrument and that said instrument is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

(Signed) Joseph M. Devere
(Signed) Alfred Barstow

Subscribed and sworn to before me, this 6th day of June, 1930.

(Signed) Margaret Howlett
[Seal] Notary Public in and for said County and State
My Commission Expires March 28, 1934

STATE OF CALIFORNIA,)
) SS.
County of Los Angeles)

F. R. KENNEY and L. W. WICKES each for himself deposes and says that he is a party to the within instrument and that said instrument is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

(Signed) F. R. KENNEY
By H. B. Duchand
Attorney-in-Fact
(Signed) L. W. Wickes

Subscribed and sworn to before me, by L. W. Wickes, this 9th day of June, 1930

(Signed) Neil C. Cross

[Seal] Notary Public in and for said County and State

Subscribed and sworn to before me, by H. B. Duchand, as Attorney in Fact for F. R. Kenney, this 9th day of June, 1930.

(Signed) Effie D. Botts

[Seal] Notary Public in and for said County and State

Deed of Trust Securing—Straight Note

This Deed of Trust, Made this 7th day of June, 1930, Between EL CAMINO OIL COMPANY, LTD., a corporation, (formerly El Camino Oil Company, a corporation), organized and existing under and by virtue of the laws of the State of Nevada, herein called TRUSTOR, Title Insurance and Trust Company a Corporation, of Los Angeles, California, herein called Trustee, and F. R. KENNEY and L. W. WICKES, herein called BENEFICIARY, Witnesseth: That Trustor hereby GRANTS to TRUSTEE, IN TRUST, WITH POWER OF SALE, all that property in the City of Los Angeles County of Los Angeles, State of California, described as:

PARCEL I: Lot Nine (9), Block F, Tract 6482, as per Book 86, Pages 72-73 of Maps, Records of Los Angeles County, State of California;

and also Trustor hereby grants, conveys, transfers, assigns and sets over to Trustee, in trust, with power of sale, all

that property in the County of Los Angeles, State of California, described as:

All Trustor's right, title and interest, as Lessee, in and to that certain written lease dated September 16, 1929 between Matilda E. Richer, Lessor, and El Camino Oil Company, a corporation, Lessee, pertaining to and covering

PARCEL II: The West Five (5) acres of the North Fourteen (14) acres of the East Fifty-five (55) acres of the South Half (S½) of the Northwest quarter (NW¼) of Section 8, Township 3 South, Range 11 West, San Bernardino Base and Meridian.

which said lease was recorded on the 24th day of September, 1929 in Book 9300, page 229 of Official Records in the office of the County Recorder of Los Angeles County, State of California, including Trustor's right under said lease to purchase said premises upon the terms and conditions set forth in said lease.

Said grant, transfer, and assignment of said Trustor's interest, as Lessee, in and to said lease is hereby made to said Trustee upon the express understanding and agreement between Trustor and Trustee that Trustee is not to be liable upon any of the covenants, obligations and requirements of said lease.

It is expressly understood and agreed that all that certain oil refinery located upon Parcel II above described and all that certain bulk plant located upon Parcel I above described, including all machinery, equipment and fixtures and all tanks, vats, pumps, boilers, engines, meters, pipes, stills, and fractionating towers now situated upon the above described premises, or either of them, in whatever manner affixed or attached to either of said parcels of

real property, are and shall be deemed to be real property and expressly included in the above grant, transfer and assignment.

For the Purpose of Securing:

FIRST. An indebtedness of the Trustor to the Beneficiary in the sum of Eighty Thousand Dollars ($80,000.00) in Gold Coin of the United States of the present standard of weight, fineness and value, evidenced by a certain promissory note of even date herewith (and any renewal or extension thereof), which said indebtedness the said Trustor has agreed to repay with interest thereon to the said Beneficiary, or to their order, in like Gold Coin according to the terms of said promissory note executed and delivered by said Trustor to said Beneficiary contemporaneously herewith, and which said note for the purpose of identification has been registered by the Beneficiary with the Trustee.

TITLE INSURANCE AND TRUST COMPANY,
433 So. Spring Street, Los Angeles, California

KERN COUNTY OFFICE
1715 Chester Avenue, Bakersfield

SANTA BARBARA OFFICE
14 East Carrillo Street, Santa Barbara

SAN LUIS OBISPO OFFICE
998 Monterey Street, San Luis Obispo

$..... ....., California,.....,19.....
.....after date, for
value received,.....
.....promise.... to pay to
.....

....., or order, at

.....,

the sum of.....DOLLARS,
with interest from.....until paid, at the rate of
.....per cent per annum, payable.....

Should interest not be so paid it shall thereafter bear like interest as the principal. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable in United States gold coin. If suit or action shall be instituted in any Court to collect any sum becoming due on this note, the undersigned promise to pay such sum as the Court may adjudge reasonable as attorney's fees in said suit or action. This note is secured by a DEED OF TRUST to TITLE INSURANCE AND TRUST COMPANY, a corporation, of Los Angeles, California.

....
....

SECOND. Payment and/or performance of every obligation, covenant, promise or agreement herein and/or in said note contained.

TO HAVE AND TO HOLD SAID PROPERTY UPON THE FOLLOWING EXPRESS TRUSTS, TO-WIT:

A. Trustor promises and agrees, during continuance of these Trusts:

1. For the purpose of protecting and preserving the security of this Deed of Trust: (a) to properly care for and keep said property in good condition and repair;

(b) not to remove or demolish any building thereon; (c) to complete in a good and workmanlike manner any building which may be constructed thereon, and to pay when due all claims for labor performed and materials furnished therefor; (d) to comply with all laws, ordinances and regulations requiring any alterations or improvements to be made thereon; (e) not to commit or permit any waste or deterioration thereof; (f) not to commit, suffer or permit any act to be done in or upon said property in violation of any law or ordinance; (g) to cultivate, irrigate, fertilize, fumigate, prune and/or do any other act or acts, all in a timely and proper manner, which, from the character or use of said property, may be reasonably necessary to protect and preserve said security, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire insurance policy shall be credited first, to accrued interest; next, to expenditures hereunder and any remainder upon the principal, and interest shall thereupon cease upon the amount so credited upon principal; provided, however, that at option of Beneficiary, the entire amount so collected or any part thereof may be released to Trustor, without liability upon Trustee for such release.

3. To appear in and defend any action or proceeding purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary and/or Trustee may appear.

4. To pay: (a) before delinquency, all taxes and assessments affecting said property, (including assessments on appurtenant water stock), and any costs or penalty thereon; (b) when due, all incumbrances (including any debt secured by Deed of Trust) and/or interest thereon, which appear to be liens or charges upon said property or any part thereof prior to this Deed of Trust; (c) all costs, fees and expenses of these Trusts, including cost of evidence of title and Trustee's fees in connection with sale, whether completed or not, which amounts shall become due upon delivery to Trustee of Declaration of Default and Demand for Sale, as hereinafter provided.

5. To pay without demand, all sums expended by Trustee or Beneficiary under the terms hereof with interest from date of expenditure at the rate of ten per cent per annum.

B. Should Trustor fail or refuse to make any payment or do any act, which he is obligated hereunder to make or do, at the time and in the manner herein provided, then Trustee and/or Beneficiary, each in his sole discretion, may, without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof:

1. Make or do the same in such manner and to such extent as may be deemed necessary to protect the security of this Deed of Trust, either Trustee or Beneficiary being authorized to enter upon and take possession of said property for such purposes.

2. Commence, appear in or defend any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or against Trustor, Trustee or Beneficiary; or

3. Pay, purchase, contest or compromise any prior claim, debt, lien, charge or incumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder.

Provided, that neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts above mentioned, but, upon election of either or both so to do, employment of an attorney is authorized and payment of the fees of such attorney in a reasonable sum is hereby secured.

C. Trustee shall be under no obligation to notify any party hereto of any action or proceeding of any kind in which Trustor, Beneficiary and/or Trustee shall be named as defendant, unless brought by Trustee.

D. Acceptance by Beneficiary of any sum in payment of any indebtedness secured hereby, after the date when the same is due, shall not constitute a waiver of the right either to require prompt payment, when due, of all other sums so secured or to declare default as herein provided for failure so to pay.

E. Trustee may, at any time, or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed of Trust and the note secured hereby for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby or the effect of this Deed of Trust upon the remainder of said property:

1. Reconvey any part of said property;
2. Consent in writing to the making of any map or plat thereof; or
3. Join in granting any easement thereon.

F. Upon payment of all sums secured hereby and surrender to Trustee, for cancellation, of this Deed of Trust and the note secured hereby Trustee, upon receipt from Beneficiary of a written request reciting the fact of such payment and surrender, shall reconvey, without warranty, the estate then held by Trustee, and the Grantee in such reconveyance may be described in general terms as "the person or persons legally entitled thereto," and Trustee is authorized to retain this Deed of Trust and such note. The recitals in such reconveyance of any matters or facts shall be conclusive proof against all persons of the truthfulness thereof.

G. 1. Should breach or default be made by Trustor in payment of any indebtedness secured hereby and/or in performance of any obligation, covenant, promise or agreement herein, or in said note contained, then Beneficiary may declare all sums secured hereby immediately due by the execution and delivery to Trustee of a written Declaration of Default and Demand for Sale, whereupon all sums secured hereby shall become and be immediately due and payable, and shall surrender to Trustee this Deed of Trust, the note and receipts or other documents evidencing any expenditures secured thereby.

Beneficiary shall also execute and deliver to Trustee a written notice of such breach or default and of his election to cause to be sold the herein described property to satisfy the obligations hereof, and thereafter Trustee shall cause such notice to be recorded in the office of the recorder of the county or counties wherein said real property or some part thereof is situated.

Beneficiary, from time to time before Trustee's sale, may rescind any such notice of breach or default and of election to cause to be sold said property by executing and

delivering to Trustee a written notice of such rescission, which notice, when recorded in the office of the recorder of the aforesaid county or counties, shall also constitute a cancellation of any prior Declaration of Default and Demand for Sale. The exercise by Beneficiary of such right of rescission shall not constitute a waiver of any breach or default, then existing or subsequently occurring, or impair the right of Beneficiary to execute and deliver to Trustee, as above provided, other Declarations of Default and Demand for Sale, and notices of breach or default and of election to cause to be sold said property to satisfy the obligations hereof, nor otherwise affect any provision, covenant or condition of said note and of this Deed of Trust or any of the rights, obligations or remedies of the parties thereunder.

2. After three months shall have elapsed following recordation of any such notice of breach or default and of election to cause to be sold said property, as to which no notice of rescission has been recorded, Trustee, without demand on Trustor, shall sell said property, as herein provided, at such time and at such place in the State of California as the Trustee, in its sole discretion, shall deem best to accomplish the objects of these Trusts, having first given notice of the time and place of such sale in the manner and for a time not less than that required by the laws of the State of California for sales of real property under Deeds of Trust.

3. Trustee may postpone sale of all, or any portion, of said property by public announcement at the time fixed by said notice of sale, and may thereafter postpone said sale from time to time by public announcement at the time fixed by the preceding postponement; and without further notice it may make such sale at the time to which

the same shall be so postponed, provided, however, that the sale or any postponement thereof must be made at the place fixed by the original notice of sale.

4. At the time of sale so fixed, Trustee may sell the property so advertised, or any part thereof, either as a whole or in separate parcels at its sole discretion, at public auction, to the highest bidder for cash in United States gold coin, all payable at time of sale, and after any such sale and due payment made, shall execute and deliver to such purchaser a deed or deeds conveying the property so sold, but without covenant or warranty, express or implied, regarding title, possession or incumbrances. Trustor hereby agrees to surrender immediately and without demand possession of said property to such purchaser. The recitals in such deed or deeds of any matters or facts affecting the regularity or validity of said sale shall be conclusive proof of the truthfulness thereof and such deed or deeds shall be conclusive against all persons as to all matters or facts therein recited. Trustee, Beneficiary, any person on behalf of either or any other person, may purchase at such sale.

H. Trustee shall apply the proceeds of any such sale to payment of:

1. (a) Expenses of sale; (b) all costs, fees, charges and expenses of Trustee and of these Trusts, including cost of evidence of title and Trustee's fee in connection with sale;

2. All sums expended under the terms hereof, not then repaid, with accrued interest at the rate of ten per cent per annum;

3. Accrued interest on said note;

4. Unpaid principal of said note; or if more than one, the unpaid principal thereof pro rata and without preference or priority; and

5. The remainder if any to the person or persons legally entitled thereto, upon proof of such right.

I. This Deed of Trust in all its parts applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns.

J. Trustee accepts these Trusts when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law.

In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

In Witness Whereof Trustor has executed this instrument.

EL CAMINO OIL COMPANY, LTD.
By (Signed) Joseph M. Devere, President
By (Signed) Alfred Barstow, Secretary

.....

.....

STATE OF CALIFORNIA }
} ss.
COUNTY OF Los Angeles }

On this 7th day of June, 1930, before me, MARGARET HOWLETT, a Notary Public in and for said County, personally appeared Joseph M. Devere and Alfred Barstow, known to me to be the President and Secretary, re-

spectively, of EL CAMINO OIL COMPANY, LTD., the corporation which executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

WITNESS my hand and official seal.

(Notarial Seal)

My commission expires March 28, 1934

(Signed) MARGARET HOWLETT

Notary Public in and for said County and State.

Indexed as Trust Deed, Assignment of Lease and Chattel Mortgage

(This Deed of Trust may be executed by a corporation, in which case the corporation form of acknowledgment must be used.)

NOTE—DO NOT DETACH OR RECORD THIS FORM which is to be used ONLY when note is paid and Reconveyance of this Deed of Trust is requested.

A reconveyance will be issued ONLY upon presentation to TITLE INSURANCE AND TRUST COMPANY of this request properly signed and accompanied by the reconveyance fee, the Deed of Trust, the original note or notes secured by said Deed of Trust, and any receipt or document evidencing any other indebtedness secured thereby. In case of partial reconveyance use special form for that request and present Deed of Trust, together with the note or notes secured thereby to the Trustee for endorsement.

REQUEST FOR FULL RECONVEYANCE.

To TITLE INSURANCE AND TRUST COMPANY,
Trustee Register No.....

The undersigned is the legal owner and holder of the note or notes, and all other indebtedness secured by the foregoing Deed of Trust.

Said note or notes, together with all other sums and indebtedness secured by said Deed of Trust, have been fully paid and satisfied; and you are hereby requested and directed upon cancellation by you of said note or notes above mentioned, and upon surrender to you of said Deed of Trust, with receipts or other documents evidencing any other indebtedness secured thereby, and upon payment to you of any sums owing to you under the terms of said Deed of Trust, to reconvey, without warranty, to the parties designated by the terms of said Deed of Trust, all the estate now held by you under said Deed of Trust.

Dated....., 19.....

.....

.....

.....

TRUSTEE'S FEES:

A. For Reconveyances.

A reasonable fee will be charged by the Trustee for each partial or full reconveyance, with a minimum fee of $2.50 for full reconveyance and $3.50 for each partial reconveyance.

B. For Trustee's Sale.

Trustee's Fees exclusive of posting, advertising and other expenses, in any ordinary sale of property will be computed on the unpaid balance of principal due on the note, accrued interest, advances and interest thereon all computed to date of sale; the schedule based on this total amount being as follows:

For the first $ 1,000., or part thereof, at the rate of 10 per cent with a minimum of $50.00;

For the next $ 7,000. at the rate of 3 per cent;

For the next $ 42,000. at the rate of 2 per cent;

For the next $ 50,000. at the rate of 1 per cent;

For all above $100,000. at the rate of one-half of one per cent.

Register No. 36601

DEED OF TRUST
WITH POWER OF SALE
Straight Note
EL CAMINO OIL COMPANY Ltd.
a corporation,
TO
TITLE INSURANCE AND TRUST COMPANY
AS TRUSTEE FOR
F. R. KENNEY and L. W. WICKES

Dated.....19.....

RECORDER'S PRINTED FORM 117
Order No. 1530
Escrow No. .....

WHEN RECORDED PLEASE MAIL TO:
Newlin & Ashburn 935 Rowan Bldg. L. A.

Recorded June 10, 1930, 5 min. past 4 p. m. in Book 10022 at Page 233 of Official Records Los Angeles County, Cal. C. L. Logan County Recorder

I hereby certify that I have correctly transcribed this document in above mentioned book. (Signed) M. Gorline #64 Compared Document Fitzmeier Book Kingsbury.

[Title of Court and Cause.]

STIPULATION FOR ENTRY OF JUDGMENT

WHEREAS, The People of the State of California, plaintiff in the above entitled action, have heretofore filed suit in the Superior Court of Los Angeles County against El Camino Oil Company, Ltd., a corporation, the defendant above named, for the sum of $297,537.80, representing motor vehicle fuel taxes duly levied and assessed, together wtih a penalty for non-payment thereof; and

WHEREAS, defendant acknowledges that said above mentioned amount is justly and legally due from defendant to plaintiff; and

WHEREAS, defendant is desirous of paying said amount in installments pursuant to arrangements heretofore made with the controller of the State of California;

NOW THEREFORE, IT IS HEREBY UNDERSTOOD, AGREED AND STIPULATED by defendant that any time deemed necessary by plaintiff's legal representatives, judgment may be entered herein for the amount above mentioned, less any payments made thereon subsequent to the filing of this action, with interest at the rate of seven per cent per annum (7%) from the date of judgment, and for costs of suit, findings of fact and conclusions of law being hereby waived.

IT IS FURTHER UNDERSTOOD, AGREED AND STIPULATED that nothing herein contained shall in any

manner affect any right or remedy of the plaintiff herein in respect to said action or any proceedings in connection therewith.

IN WITNESS WHEREOF, this stipulation has been signed this 30th day of June, 1931, by defendant through its representatives thereunto duly authorized.

EL CAMINO OIL COMPANY, LTD.,

By .....
President.

By .....
Secretary.

U. S. WEBB

.....
Attorney General.

H. H. LINNEY

.....
Deputy Attorney General.

.....

.....
Attorney for Def.

[Endorsed]: Filed May 20, 1935 R. S. Zimmerman Clerk By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION AS TO ADDITIONAL FACTS.

IT IS HEREBY STIPULATED by the Receiver for the above named company and the People of the State of California by and through its Attorney General of the said State in addition to the stipulation heretofore filed in the above entitled matter as follows:

That the El Camino Oil Company, Ltd. has not been at any of the times mentioned in the stipulation heretofore filed herein and is not now the owner of the real property described as Parcel II in said Deed of Trust dated June 7, 1930, and on which parcel is located the oil refinery of the said El Camino Oil Company, Ltd. That the only right, title or interest of said company in and to said premises was and is under and by virtue of that certain lease dated September 16, 1929, referred to in said Deed of Trust and under the substituted lease hereinafter referred to. That a true and correct copy of the said lease is attached hereto, made a part hereof and marked Exhibit "A".

That after the execution of the said lease and after the appointment of the Receiver herein, a new lease was substituted in place and instead of the lease attached hereto and marked Exhibit "A", and that a true copy of the said new lease is attached hereto and marked Exhibit "B".

That at the time the said Exhibit "A" was made, executed and delivered, said premises were vacant and unimproved. That thereafter and prior to the date of

any of the distributions for which taxes are levied, as set forth in said stipulation heretofore filed, said El Camino Oil Company, Ltd. erected and installed said refinery plant and equipment. That all of the property now in the possession of the Receiver herein (except repairs and replacements) was at all times during which the aforesaid distributions were made by the said El Camino Oil Company, Ltd. owned by the said company or were in the possession and use of the said company under conditional sales contracts reserving title in the conditional vendor for the purpose of security until payment in full of the purchase price, or were in the possession and use of and by said company under contracts designated Lease Contracts, which provided for the purchase of the said property by the company upon complying with the terms and conditions of the said contract. That attached hereto, made a part hereof, and marked Exhibit "E" is a Lease Contract which is typical in its form and provisions of all of the said lease contracts referred to herein.

That attached hereto and made a part hereof and marked Exhibit 'C" is a schedule showing property in possession of the said El Camino Oil Company, Ltd. on June 7, 1930, which property was being purchased under conditional contracts of sale. Said schedule further shows the date of the contracts relating to the purchase of the said property, the total price and the balance due as of June 7, 1930. Said schedule further sets forth property in possession of the said El Camino Oil Company, Ltd. pursuant to lease contracts and the date of the said con-

tracts, the total price and the balance unpaid on June 7, 1930.

That attached hereto and made a part hereof and marked Exhibit "D" is a schedule showing the condition of the said conditional sales contracts and lease contracts as of March 31, 1931. That the said Exhibit "D" further sets forth the payments on the said contracts between March 31, 1931, and the appointment of the Receiver herein and further sets forth the balance due at the date of the receivership which has been paid by the Receiver. That all balances due on the said contracts have now been paid, and that title to the said property is now in the said El Camino Oil Company, Ltd. or the Receiver for the said company.

That the moneys paid by the Receiver on account of the said contracts were receipts from the operation of the said refinery by the lessee thereof as shown in the reports and accompanying accounts filed by the Receiver herein. That the Chattel Mortgage dated June 6, 1930, a copy of which is attached as an exhibit to the aforesaid stipulation of facts heretofore filed herein was recorded on June 10, 1930, in Book 10042, Page 186 of Official Records in the Office of the County Recorder of Los Angeles County, California. That at no times has there been any transfer of possession by the said El Camino Oil Company, Ltd. of any of the properties described in the said Deed of Trust to the beneficiaries named therein or of any of the properties described in said Chattel Mortgage

to the mortgagees named therein, the said El Camino Oil Company, Ltd. having been continuously in possession of all of said property at all times mentioned herein until possession of the same was taken by the Receiver herein.

DATED: September 30th, 1935.

Earl Glen Whitehead
Attorney for Receiver

U. S. WEBB,
Attorney General

By John O. Palstine
Attorneys for Claimant

The undersigned, attorneys for F. R. KENNEY and L. W. WICKES, beneficiaries under the Deed of Trust referred to in the foregoing stipulation and Mortgagees under the Chattel Mortgage referred to in the foregoing stipulation, hereby on behalf of the said Beneficiaries and Mortgagees join in the foregoing stipulation and also hereby on behalf of the said Beneficiaries and Mortgagees join in the aforesaid stipulation of facts heretofore filed herein and signed by the attorney for the Receiver herein and for the People of the State of California, Claimant herein.

DATED: September 30th, 1935.

W J. Kenney
Orrick, Palmer & Dahlquist.
Attorneys for F. R. Kenney and L. W. Wickes

EXHIBIT "A"

LEASE OF REAL PROPERTY

This indenture made the 16th day of September, 1929, between MATILDA E. RICHER, of the City of Los Angeles, County of Los Angeles, State of California, hereinafter called the lessor, which expression, where the context so admits, shall include her executors, administrators, heirs and assigns, of the first part, and EL CAMINO OIL COMPANY, a corporation, of the other part, witnesseth:

1. In consideration of the rent and the lessee's covenants hereinafter reserved and contained the lessor hereby demises and leases unto the lessee that certain piece or parcel of land, situated, lying and being in the County of Los Angeles, State of California, particularly described as follows, to-wit:

> The West Five (5) acres of the North Fourteen (14) acres of the East Fifty-five (55) acres of the South half (S½) of the Northwest quarter (NW¼) of Section 8, Township 3 South, Range 11 West, San Bernardino Base and Meridian.

To have and to hold the said lands and premises for and during the term of ten (10) years from the 16th day of September, 1929.

Yielding and paying therefor the yearly rent of TWO THOUSAND FOUR HUNDRED DOLLARS ($2-400.00) for the first two years of this lease, in quarter-yearly installments, each in advance, of SIX HUNDRED DOLLARS ($600.00) each, at the office of the lessor's agent, LEO M. DALY, 319 Chester Williams Building,

215 West Fifth Street, Los Angeles, California, or at such other place as the lessor may from time to time designate in writing, on the 16th days of September, December, March and June of each of the first two years of said term, and thereafter the yearly rent of THREE THOUSAND DOLLARS ($3000.00) for the next three (3) years of this lease, in quarter-yearly installments of SEVEN HUNDRED FIFTY DOLLARS ($750.00) each, at the place aforesaid, on the 16th days of September, December, March and June of each of the next three (3) years of said term and thereafter the yearly rent of THREE THOUSAND and SIX HUNDRED DOLLARS ($3600.00) for the next five (5) years of said term, in quarter-monthly installments of NINE HUNDRED DOLLARS ($900.00) each, at the place aforesaid, on the said 16th days of September, December, March and June of each of the last five years of said term.

2. The lessee, to the intent that the obligations may continue throughout the term hereby created, covenants with the lessor as follows:

(1) To pay the rent reserved on the days and in the manner aforesaid.

(2) To bear, pay and discharge all taxes, assessments, duties, impositions, and burdens whatsoever assessed, charged, or imposed after the execution of this lease, whether by the nation, state, county, city or any other public authority, including taxes for the last half of the year 1929-1930, upon the demised premises or any erections thereon, or upon the owner or occupier in respect thereof, or payable by either in respect thereof and to deliver to the lessor at all times promptly and sufficient

receipts and other evidence of the payment and discharge of the same.

(3) To promptly pay, in addition to the rents above specified, all gas, electric power, electric light, and water rates or charges which may become payable during the continuance of this lease for gas, electric power, electric lights, and water used on said premises.

(4) In case of the erection of any building or buildings or improvements on said demised premises, or any additions thereto, or repair, alteration or improvement of any building or buildings now on said demised premises or hereafter placed thereon, the lessee will pay for all labor performed and material furnished in or about such erection, repairs, alterations or improvements, and keep said demised premises and buildings and improvements thereon at all times free and clear of all liens for labor or materials furnished in and about such erection, repairs, alterations or improvements, and will defend at its own cost and expense, each and every lien asserted or claim filed against said premises or the buildings or improvements thereon, or any part thereof for labor claimed to have been so performed or material claimed to have been so furnished, and pay each and every judgment made or given against said premises, or any part thereof or the buildings or improvements thereon, or against the lessor on account of any such lien, and indemnify and save harmless the lessor from all and every claim and action on account of such claim, lien or judgment, arising out of or connected with such act or omission of the lessee, or any of its agents, employees or contractors, in or about such erection, repairs, alterations, improvements or employments.

(5) To indemnify the lessor against all costs and expenses, including counsel fees, lawfully and reasonably incurred in or about the premises, or in the defense of any action or proceeding, or in discharging the premises from any charge, lien, or incumbrance, or in obtaining possession after default of the lessee or the determination of this demise.

(6) That if an execution or other process be levied upon the interest of the lessee in this lease, or if a petition in bankruptcy be filed by or against the lessee in any court of competent jurisdiction, the lessor shall have the right, at her option, to re-enter said premises and annul this lease.

(7) Not to do or suffer anything to be done, by which persons or property in or about or adjacent to the demised premises may be injured or endangered; and the lessee agrees to indemnify and save harmless the lessor from any claim of any person of injuries to life, person, or property by reason of anything done, or permitted to be done or suffered, or omitted to be done, by the lessee in and about the occupation of said premises.

(8) To assume all risks of loss, injury, or damage of any kind or nature whatsoever to any building, structure, equipment or improvement belonging to said lessee, which may be now or hereafter placed upon said leased premises, and all risks of loss, injury, or damage of any kind or nature whatsoever to the contents of any such building or structure, or to any goods, merchandise, chattels or any other property now or that may hereafter be upon said leased premises, whether belonging to the lessee or others, and whether such loss, be caused by the negligence of the lessor, or any of her agents or otherwise, and to

save and keep harmless the lessor from all claims and suits growing out of any such loss, injury, or damage.

(9) That the lessee has examined the demised premises, and knows the condition of said premises and agrees to accept the same in the condition which they are now in.

(10) Not to make or suffer any waste on the premises.

(11) At the termination of this lease by lapse of time or otherwise to yield up the premises to the lessor in as good condition as the same are at the commencement of the said term, reasonable use and wear thereof excepted.

(12) Not to use said demised premises for any other purposes except to erect, maintain and operate thereon an oil refinery, absorption plant and cracking plant, together with all necessary machinery, tanks, vats, stills, boilers, pipes, and equipment used in the process of refining crude oil and extracting gasoline and other petroleum products from hydro-carbon substances.

(13) That in the event the lessee assigns this lease or sublets said demised premises the lessee shall not at any time during the term of said lease be released from any of the obligations thereunder, and the lessee shall at all times during said term be liable and responsible to the lessor for the faithful performance and observance of all its covenants and agreements therein contained.

3. The lessor hereby covenants with the lessee as follows

(1) That the lessee shall and will upon payment of the rents, taxes and assessments and all other sums of money herein provided to be paid by the lessee, and upon fully observing and performing the covenants and agree-

ments herein provided to be observed and performed by the lessee, quietly and peaceably possess and enjoy the above described premises during the full term of this lease without any interruption by the lessor or any person rightfully claiming under her, unless said lease be sooner terminated under and in accordance with any of the provisions herein contained, providing for such termination.

(2) That the lessor will, on the written request of the lessee made two calendar months, before the expiration of the term hereby created, and if there shall not be at the time of such request any breach or nonobservance of any of the covenants on the part of the lessee hereinbefore contained, grant to the lessee a lease of the demised premises for the further term of five (5) years from the expiration of the said term at the yearly rent of FOUR THOUSAND FIVE HUNDRED DOLLARS ($4500.00) payable quarter-yearly in advance and containing the like covenants and provisos as are herein contained, with the exception of the present covenant for renewal, the lessee on the execution of such renewed lease to execute a counter part thereof.

(3) That if the lessee within five years from the commencement of the term hereby created, shall give to the lessor two calendar months notice in writing that it desires to purchase the premises herein demised, and if there shall not at the time of such notice be any existing breach or nonobservance of any of the covenants on the part of the lessee hereinbefore contained, the lessor on the expiration of such notice will, upon payment of the sum of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS ($17,500.00), and of all arrears of

rent to the expiration of the notice and of interest on the said sum of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS ($17,500.00) at the rate of eight per cent per annum from the expiration of the notice until payment, by good and sufficient grant deed convey the demised premises to the lessee in fee simple, free and clear of all incumbrances, except this lease, conditions, restrictions and reservations of record, and taxes and assessments, if any, together with an easement for ingress and egress to said premises over a strip of land twelve feet wide extending in a westerly direction from Schumacher Road in the aforesaid County of Los Angeles, to the Eastern line of the demised premises, along the North line of the East Nine (9) acres of the North Fourteen (14) acres of the East Fifty-five (55) acres of the South Half (S½) of the Northwest quarter (NW¼) of Section 8, Township 3 South, Range 11 West, San Bernardino Base and Meridian.

(4) That boilers, engines, machinery, tanks, vats, stills, pipes, equipment and fixtures, and all personal property erected on said leased premises by the lessee may be removed by the lessee at the termination of this lease, or any extension thereof, even though the same may be attached to said premises: Provided, the lessee shall not then be in default in the performance of the covenants hereof; and provided further, that the removal of any such property shall be effected before the expiration of said term, or any extension thereof, and all damages caused to said premises by such removal shall be repaired by the lessee on or before the expiration of said term.

(5) That the lessee shall have the right during the term of this lease to use for the purpose of ingress and

egress to said demised premises, a strip of land twelve feet in width extending in a westerly direction from Schumacher Road, in the aforesaid County of Los Angeles, along the north line of the East Nine (9) acres of the North Fourteen (14) acres of the East Fifty-five (55) acres of the South half (S½) of the Northwest quarter (NW¼) of Section 8, Township 3 South, Range 11 West, San Bernardino Base and Meridian, to the Eastern line of said demised premises.

4. If the lessee shall, at any time hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of thirty days or shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements thereof, and such default shall continue for the space of three months after notice from the lessor of such default requiring the lessee to remedy the same, then and in either of such cases the lessor may at any time either:

(a) Proceed by proper action or actions in the proper courts, either at law or in equity, to enforce performance of such covenants by the lessee or to recover damages for the breach thereof; or

(b) By notice in writing determine this lease, and thereupon enter into and upon the demised property, and shall thence forth hold, possess and enjoy the same free from any right of the lessee to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the lessee to the use of the demised premises shall absolutely cease and determine as though

this lease had never been made; but the lessor shall, nevertheless, have the right to recover from the lessee any and all amounts which under the terms hereof may then be due and unpaid for the use of the demised premises.

5. It is expressly understood and agreed by and between the parties hereto that this lease may be assigned by the lessee, for the purposes herein recited and subject to all the terms, conditions and covenants herein contained, to any corporation now in existence or that may hereafter be formed for the purposes of succeeding the lessee or of assuming the operation, management and control of the business of the lessee; that said assignee and all successive assignees shall, in the various instruments of assignment, expressly assume all the lessee's covenants and obligations hereunder, and upon said assignment or subsequent assignments the original lessee, during all of said term or any renewal thereof, shall remain liable and responsible to the lessor for the faithful performance and observance of all the covenants and agreements in said lease contained.

6. No assent, express or implied, by lessor, to any breach of any of lessee's covenants or agreements, shall be deemed or taken to be a waiver of any succeeding breach of the same covenant or agreement.

7. In case any of the buildings, improvements or equipment now or hereafter placed on said demised premises are injured or destroyed or rendered untenantable or useless by fire, the elements or any other cause, such destruction or injury shall not operate to terminate this

lease, but this lease shall continue in full force and effect.

8. In the event the lessee exercises the option to purchase said demised premises as hereinbefore provided, said sale of said property shall be subject to a reservation by the lessor, her executors, administrators, heirs or assigns, of a one-eight (1/8) interest in and to all minerals, including oil and gas, in said land agreed to be sold as aforesaid.

9. It is mutually agreed by and between the parties, for themselves, and their heirs, legal representatives, successors, and assigns, that all the rights, duties, terms, conditions, agreements, and covenants herein set forth shall run with said leased premises, and shall inure and apply to and bind the heirs, legal representatives, successors, and assigns of said parties respectively.

IN WITNESS WHEREOF, the parties hereto and to another instrument of like tenor have hereunto set their hands and seals the day and year first above written.

MATILDA E. RICHER
LESSOR

EL CAMINO OIL COMPANY,
a corporation,
By BERTRAM E. DEVERE
VICE-PRESIDENT
By ALFRED BARSTOW
SECRETARY

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On this 17th day of September, 1929, before me, LEO M. DALY, a Notary Public in and for said County, personally appeared MATILDA E. RICHER known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same.

WITNESS my hand and Official seal.

LEO M. DALY

Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT "B"

LEASE OF REAL PROPERTY

This indenture made the 15th day of March, 1932, between MATHILDA E. RICHER, of the City of Los Angeles, County of Los Angeles, State of California, hereinafter called the lessor, which expression where the context so admits, shall include her executors, administrators, heirs and assigns, party of the first part, and H. A. MEEK, not for himself personally, but only as Receiver for the El Camino Oil Company, Ltd., and for his successors and assigns, as such Receiver, lessee, and party of the second part, witnesseth:

1. In consideration of the rent and the lessee's covenants hereinafter reserved and contained the lessor hereby demises and leases unto the lessee that certain piece or parcel of land situated, lying and being in the County of Los Angeles, State of California, particularly described as follows, to-wit:

> The West Five (5) acres of the North Fourteen (14) acres of the East Fifty-five (55) acres of the South Half (S½) of the Northwest quarter (NW¼) of Section 8, Township 3 South, Range 11 West, San Bernardino Base and Meridian.

To have and to hold the said land and premises for and during the term of seven (7) years and six (6) months from the 15th day of March, 1932.

Yielding and paying therefor the rental as follows:

For the first ten (10) months of this lease, from March 15, 1932, until January 15, 1933, the sum of ONE HUNDRED DOLLARS ($100.00) per month, payable in

monthly installments, each in advance on the 15th day of the month. For the balance of the term of six (6) years and eight (8) months from January 15, 1933, until September 15, 1939, the sum of ONE HUNDRED FIFTY DOLLARS ($150.00) per month, payable in monthly installments, each in advance on the 15th day of the month, to the lessor at her residence, 1231 West Forty-sixth Street, Los Angeles, California, or to her agent as she may direct.

2 The lessee, to the intent that the obligations may continue throughout the term hereby created, covenants with the lessor as follows:

(1) To pay the rent reserved on the days and in the manner aforesaid.

(2) To bear, pay and discharge all taxes, assessments, duties, impositions, and burdens whatsoever assessed, charged, or imposed after the execution of this lease, whether by the nation, state, county, city or any other public authority, upon the demised premises or any erections thereon, or upon the owner or occupier in respect thereof, or payable by either in respect thereof and to deliver to the lessor at all times promptly proper and sufficient receipts and other evidence of the payment and discharge of the same.

(3) To pay promptly, in addition to the rents above specified, all gas, electric power, electric light, and water rates, or charges which may become payable during the continuance of this lease for gas, electric power, electric light, and water used on said premises.

(4) In case of the erection of any building or buildings or improvements on said demised premises, or any

additions thereto, or repair, alteration or improvement of any building or buildings now on said demised premises or hereafter placed thereon, the lessee will pay for all labor performed and material furnished in or about such erection, repairs, alterations or improvements, and keep said demised premises and buildings and improvements thereon at all times free and clear of all liens for labor or materials furnished in and about such erection, repairs, alterations or improvements, and will defend at its own cost each and every lien asserted or claim filed against said premises or the building or improvements thereon, or any part thereof for labor claimed to have been so performed or material claimed to have been so furnished and pay each and every judgment made or given against said premises, or any part thereof or the buildings or improvements, thereon, or against the lessor on account of any such lien, and indemnify and save harmless the lessor from all and every claim and action on account of such claim, lien or judgment, arising out of or connected with such act or omission of the lessee, or any of its agents, employees or contractors, in or about such erection, repairs, alterations, improvements or employments.

(5) To indemnify the lessor against all costs and expenses, including counsel fees, lawfully and reasonably incurred in or about the premises, or in the defense of any action or proceeding, or in discharging the premises from any charge, lien, or incumbrance, or in obtaining possession after default of the lessee or the determination of this demise.

(6) That if an execution or other process be levied upon the interest of the lessee in this lease, or if a petition in bankruptcy be filed by or against the lessee in any

court of competent jurisdiction, the lessor shall have the right, at her option, to re-enter said premises and annul this lease.

(7) Not to do or suffer anything to be done, by which persons or property in or about or adjacent to the demised premises may be injured or endangered; and the lessee agrees to indemnify and save harmless the lessor from any claim of any person of injuries to life, person, or property by reason of anything done, or permitted to be done or suffered, or omitted to be done, by the lessee in and about the occupation of said premises.

(8) To assume all risks of loss, injury, or damage of any kind or nature whatsoever to any building, structure, equipment or improvement belonging to said lessee, which may be now or hereafter placed upon said leased premises, and all risks of loss, injury, or damage of any kind or nature whatsoever to the contents of any such building or structure, or to any goods, merchandise, chattels or any other property now or that may hereafter be upon said leased premises, whether belonging to the lessee or others, and whether such loss, be caused by the negligence of the lessor, or any of her agents or otherwise, and to save and keep harmless the lessor from all claims and suits growing out of any such loss, injury, or damage.

(9) The lessee has examined the demised premises, and knows the condition of said premises and agrees to accept the same in the condition which they are now in.

(10) Not to make or suffer any waste on the premises.

(11) At the termination of this lease by lapse of time or otherwise to yield up the premises to the lessor in as good condition as the same are at the commencement of the said term, reasonable use and wear thereof excepted.

(12) Not to use said demised premises for any other purposes except to erect, maintain and operate thereon an oil refinery, absorption plant and cracking plant, together with all necessary machinery, tanks, vats, stills, boilers, pipes, and equipment used in the process of refining crude oil and extracting gasoline and other petroleum products from hydro-carbon substances.

(13) That in the event the lessee assigns this lease or sublets said demised premises the lessee shall not at any time during the term of said lease be released from any of the obligations thereunder, and the lessee shall at all times during said term be liable and responsible to the lessor for the faithful performance and observance of all its covenants and agreements therein contained.

3. The lessor hereby covenants with the lessee as follows:

(1) That the lessee shall and will upon payment of the rents, taxes and assessments and all other sums of money here in provided to be paid by the lessee, and upon fully observing and performing the covenants and agreements herein provided to be observed and performed by the lessee, quietly and peaceably possess and enjoy the above described premises during the full term of this lease without any interruption by the lessor or any person rightfully claiming under her, unless said lease be sooner terminated under and in accordance with any of the provisions herein contained, providing for such termination.

(2) That the lessor will, on the written request of the lessee made two calendar months before the expiration of the term hereby created, and if there shall not

be at the time of such request any breach or nonobservanced of any of the covenants on the part of the lessee hereinbefore contained, grant to the lessee a lease of the demised premises for the further term of five (5) years from the expiration of the said term at the monthly rental of ONE HUNDRED FIFTY DOLLARS ($150.00) payable monthly in advance and contained in the like covenants and provisos as are herein contained, with the exception of the present covenant for renewal, the lessee on the execution of such renewed lease to execute a counter part thereof.

(3) That if the lessee at any time prior to September 15, 1934, shall give to the lessor two calendar months notice in writing that he desires to purchase the premises herein demised, and if there shall not at the time of such notice by any existing breach or nonobservance of any of the covenants on the part of the lessee hereinbefore contained, the lessee on the expiration of such notice shall have the right to purchase the herein described property for a purchase price to be determined as follows: The price to be paid for said property shall be its actual value at the time of exercising this option as determined by a board of three (3) appraisers, one to be appointed by the lessor, one appointed by the lessee, and a third to be appointed by the appraisers themselves. The final appraisal of this board shall be accepted by both parties to this lease as the actual purchase price to be paid for the herein described property, and upon the expiration of the aforementioned notice and the payment of the sum determined by the appraisers to be the purchase price, the first party will by good and sufficient grant deed con-

vey the demised premises to the lessee in fee simple, free and clear of all incumbrances, except this lease, conditions, restrictions and reservations of record, and taxes and assessments, if any, together with an easement for ingress and egress to said premises over a strip of land twelve feet wide extending in a westerly direction from Schumacher Road in the aforesaid County of Los Angeles, to the Eastern line of the demised premises, along a North line of the East Nine (9) acres of the North Fourteen (14) of the East Fifty-five (55) acres of the Southern Half (S½) of the Northwest Quarter (NW¼) of Section 8, Township 3 South, Range 11 West, San Bernardino Base and Meridian.

(4) That boilers, engines, machinery, tanks, vats, stills, pipes, equipment and fixtures, and all personal property erected on said leased premises by the lessee may be removed by the lessee at the termination of this lease, or any extension thereof, even though the same may be attached to said premises: Provided, the lessee shall not then be in default in the performance of the covenants hereof; and provided further, that the removal of any such property shall be effected before the expiration of said term, or any extension thereof, and all damages caused to said premises by such removal shall be repaired by the lessee on or before the expiration of said term.

(5) That the lessee shall have the right during the term of this lease to use for the purpose of ingress and egress to said demised premises, a strip of land twelve

feet in width extending in a westerly direction from Schumacher Road, in the aforesaid County of Los Angeles, along the north line of the East Nine (9) acres of the North Fourteen (14) acres of the East Fifty-five (55) acres of the South half (S½) of the Northwest quarter (NW¼) of Section 8, Township 3 South, Range 11 West, San Bernardino Base and Meridian, to the Eastern line of said demised premises.

(4) If the lessee shall, at any time hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of thirty days or shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements thereof, and such default shall continue for the space of three months after notice from the lessor of such default requiring the lessee to remedy the same, then and in either of such cases the lessor may at any time either:

(a) Proceed by proper action or actions in the proper courts, either at law or in equity, to enforce performance of such covenants by the lessee or to recover damages for the breach thereof; or

(b) By notice in writing determine this lease, and thereupon enter into and upon the demised property, and shall thenceforth hold, possess and enjoy the same free from any right of the lessee to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the lessee to the use of the demised prem-

ises shall absolutely cease and determine as though this lease had never been made; but the lessor shall, nevertheless, have the right to recover from the lessee any and all amounts which under the terms hereof may then be due and unpaid for the use of the demised premises.

5. It is expressly understood and agreed by and between the parties hereto that this lease may be assigned by the lessee, for the purposes herein recited and subject to all the terms, conditions and covenants herein contained, to any corporation now in existence or that may hereafter be formed for the purposes of succeeding to the lessee or of assuming the operation, management and control of the business of the lessee; that said assignee and all successive assignees shall, in the various instruments of assignment, expressly assume all the lessee's covenants and obligations hereunder, and upon said assignment or subsequent assignments the original lessee, during all of said term or any renewal thereof, shall remain liable and responsible to the lessor for the faithful performance and observance of all the covenants and agreements in said lease contained.

(6) No assent, express or implied, by lessor, to any breach of any of lessee's covenants or agreements, shall be deemed or taken to be a waiver of any succeeding breach of the same covenant or agreement.

(7) In case any of the buildings, improvements or equipment now or hereafter placed on said demised premises are injured or destroyed or rendered untenantable or

useless by fire, the elements or any other cause, such destruction or injury shall not operate to terminate this lease, but this lease shall continue in full force and effect.

(8) In the event the lessee exercises the option to purchase said demised premises as hereinbefore provided, said sale of said property shall be subject to a reservation by the lessor, her executors, administrators, heirs or assigns, of a one-eight (1/8) interest in and to all minerals, including oil and gas, in said land agreed to be sold as aforesaid.

(9) It is mutually agreed by and between the parties, for themselves, and their heirs, legal representatives, successors, and assigns, that all the rights, duties, terms, conditions, agreements, and covenants herein set forth shall run with said leased premises, and shall inure and apply to and bind the heirs, legal representatives, successors, and assigns of said parties respectively.

Matilda E. Richer

LESSOR

EL CAMINO OIL COMPANY, LTD.

H. A. MEEK, RECEIVER

H. A. Meek

H. A. MEEK

Approved as to form 3/15/32

Lewis E. Whitehead

Attorney for the Receiver

EXHIBIT "C"

SALES CONTRACTS AND BALANCES DUE AS OF JUNE 7, 1930

KIND OF PROPERTY	FROM WHOM PURCHASED	DATE OF CONTRACT	TOTAL PRICE	BALANCE June 7, 1930
1-1000 Bbl. Steel Tank and 2- 500 Bbl. Steel Tanks	American Pipe & Steel Co.	March 20, 1930	$ 1691.50	$ 563.83
1-Star Compressing Unit	Sprayway Corporation	November 25, 1929	575.65	175.76
1-200 Horsepower Boiler & Fittings	Consolidated Steel Corp.	November 14, 1929	4700.00	600.00
1-Sundstrand	General Office Equipment Company	May 14, 1930	535.60	329.60
3-Monroe Calculating Machines	Monroe Calculating Machine Company	March 7, 1930	1098.83	498.47
1-8x12x9 Horizontal Compressor Water Well Pump	Worthington Machinery Corp.	April 11, 1930	1685.00	1685.00
	Pomona Pump Co.	October 3, 1929	758.80	300.00
			$11045.38	$ 4152.66

LEASE CONTRACTS AND BALANCES DUE AS OF JUNE 7, 1930

KIND OF PROPERTY	FROM WHOM PURCHASED	DATE OF CONTRACT	TOTAL PRICE	BALANCE June 7, 1930
2-5000 Bbl. Tanks 5-1000 Bbl. Tanks 3- 250 Bbl. Tanks 2- 100 Bbl. Tanks Flanges	Western Pipe & Steel Company	October 31, 1929	$11356.00)	
	Western Pipe & Steel Company	November 30, 1929	32644.50)	
2-35000 Bbl. Tanks & Miscellaneous Swing Pipes, Winches and Cables on 2-5000 Bbl. Tanks			)	$37500.00
	Western Pipe & Steel Company	November 30, 1929	3392.50)	
1-35000 Bbl. Steel Tank	Western Pipe & Steel Company	February 13, 1930	13250.00)	
			$60643.00	$37500.00

RECAPITULATION

Balance Due June 7, 1930	Sales Contracts	$ 4152.66
Balance Due June 7, 1930	Lease Contracts	37500.00
	TOTAL	$41652.66

EXHIBIT "D"

SALES CONTRACTS AND BALANCES DUE AS OF MARCH 31, 1931

KIND OF PROPERTY	FROM WHOM PURCHASED	DATE OF CONTRACT	TOTAL PRICE	BALANCE March 31, 1931

NONE FROM PRIOR SCHEDULE

LEASE CONTRACTS AND BALANCES DUE AS OF MARCH 31, 1931

KIND OF PROPERTY	FROM WHOM PURCHASED	DATE OF CONTRACT	TOTAL PRICE	BALANCE March 31, 1931
See Schedule June 7, 1930	Western Pipe & Steel Company	See Schedule June 7, 1930	$60,643.00	$33,921.75

* * * * * * * * * * *

THIRD SCHEDULE

Payments on Lease Contracts March 31, 1931 to Receivership $ 6,448.45
Leaving a Balance which has been paid by the Receiver, of $27,473.30

EXHIBIT "E"

LEASE CONTRACT

THIS LEASE, Made this 16th day of December, 1931, between the WESTERN PIPE & STEEL COMPANY OF CALIFORNIA, a corporation, party of the first part, and EL CAMINO OIL COMPANY, LTD., party of the second part;

WITNESSETH: The party of the second part leases and hires of the party of the first part, and the party of the first part hereby lets and leases to the party of the second part, the following described personal property:

2 - 3 ring,	5,000 bbl.	Western	A.	P.	I.	Bolted Tanks
5 - 2 ring,	1,000 bbl.	"	"	"	"	" "
3 - 2 ring,	500 bbl.	"	"	"	"	" "
3 - 1 ring,	250 bbl.	"	"	"	"	" "
2 - 1 ring,	100 bbl.	"	"	"	"	" "

Two (2) 5,000 bbl. A. P. I. Bolted Tanks with water coal roofs, Hydroil Gaskets, Flanges and 6" swing pipes.

One (1) 1,000 bbl. A. P. I. Bolted Tank with water seal roof and Special Hydroil Gasket and Flanges.

One (1) 35,000 bbl. A. P. I. Riveted Steel Tank with welded bottom and welded water seal roof, including spiral stairway, flanges, and 8" swing pipe, being No. 35001.

One (1) 35,000 bbl. A. P. I. Riveted Steel Storage Tank, with welded bottom and welded water seal roof, including one spiral stairway, flanges, and 8" swing pipe, being tank No. 35002.

One (1) 35,000 bbl. A. P. I. Riveted Steel Storage Tank, with welded bottom and welded water seal roof,

including one spiral stairway, flanges, and 8″ swing pipe, being No. 35003.

for a term of twenty-nine (29) months, and said party of the second part agrees it will not dispose of said property or take or allow said property to be taken out of the County of Los Angeles, State of California, and to pay to said first party for rental, hire and use of said property the sum of Twenty-eight Thousand Nine Hundred Seventy-three and 30/100 ($28,973.00) Dollars, together with interest from date on unpaid principal, at the rate of 7% per annum, payable monthly. Principal and interest payable in installments of One Thousand ($1,000) Dollars, or more, principal, together with interest from date of note on each payment of principal on the 20th day of each month, beginning on the 20th day of January, 1932, and continuing until said principal and interest have been paid in full.

The above sums are to be evidenced by a promissory note, dated the 16th day of December, 1931, bearing interest at the rate of 7% per annum, principal payable in monthly installments of One Thousand ($1,000) Dollars, together with interest as aforesaid. Said note to provide for a reasonable attorney's fees in case an attorney is hired for its collection.

IT IS EXPRESSLY AGREED, that the said first party retains the title to all said property, and the second party acquires no interest in or title to said property; the second party shall take immediate possession of all of said property, and so long as it complies with the provisions hereof, it may retain such possession. Said second party shall keep said property in good repair and pay all taxes and assessments levied or assessed thereon.

The party of the second part shall keep said property insured in favor of the party of the first part, but said insurance will be at the expense of the second party, settlement of the same to be made to the party of the first part; in case of loss the insurance money shall be retained by the party of the first part to the extent of the balance of the rent then unpaid under this lease, and the surplus, if any, paid to the party of the second part.

All of said property shall be at the risk of the party of the second part so long as the same is not in the possession of the first party, and no loss thereof or damage thereto, while not in the possession of the first party, shall relieve the second party from the payment of any part of said rent, or the payment of any amounts which may have been paid by the first party, under the terms of this lease, together with interest thereon as aforesaid. Should the second party fail to pay taxes or assessments on said property when due, or fail to keep said property in good repair, or fail to pay any amount or amounts due any person or persons by reason of said person having a lien upon said property, for repairs, or labor, or materials furnished for said property, then the first party may at its option pay the same, or have said property repaired and the amounts of said payments shall be added to the next payment of rent becoming due, and shall be repaid to the first party by the second party with such payment.

The second party agrees to pay to the first party the amount of any judgment which may be rendered against and paid by said party of the first part, together with costs and counsel fees incurred therein, by reason of any damage to person or property caused by said above-described property during the continuance of this lease.

If any attachments, or other legal process, shall at any time be levied upon said goods and chattels, or any part thereof, or if they shall be taken under any writ of attachment, or other legal process for or upon any debt or demand now due or to become due, or claimed to be due from said second party to any person or persons, that then this lease shall terminate and become void, and the right of possession in and to said goods and chattels, and every part thereof, shall revert to, and vest in said first party and said first party shall have the right, without notice or service, to take said goods and chattels, and every part thereof from second party without legal process.

If the party of the second part fails to make any payments as herein provided, or fails to comply with the terms and conditions thereof in any respect, the first party may take possession of all of said property without legal proceedings, and all payments previously made by second party to the first party shall be considered and apply as compensation for depreciation in value, and apply toward the use and rental of said property, and as liquidated damages, and said second party waives all right to the money so paid, and second party further agrees that it is liable to first party for any unpaid balance due for rent and interest thereon as provided herein.

IT IS FURTHER DISTINCTLY UNDERSTOOD AND AGREED, by and between the parties hereto, that at the expiration of said term, the second party shall return and deliver to the first party the above-described property in good order and condition.

IT IS FURTHER DISTINCTLY UNDERSTOOD AND AGREED, by and between the parties hereto, that in the event said second party complies with all the terms

and conditions of this agreement, said second party shall then, (but not otherwise) have the right to purchase said property for the further sum of $1.00 on the date of payment of last installment of rent, and said first party shall be required to transfer and sell said property to said second party for the further sum of $1.00 in cash, to be paid said first party by said second party on the said date.

IT IS FURTHER UNDERSTOOD AND AGREED that said second party will not assign this lease, nor assign or sublet its interest in or to any of the goods and chattels herein demised to any person or persons without the written consent of said first party is first obtained.

IT IS FURTHER AGREED, however, that time shall be of the essence of this lease in every particular, and that unless all the conditions of the said foregoing lease shall have been fulfilled and performed by the second party, and the said rental paid as aforesaid, then the privilege to purchase said property hereby granted, shall be waived and forfeited.

In case suit is brought to recover said property, or any part thereof, or any part of the amount due under this agreement, said second party agrees to pay a reasonable sum as and for attorney's fees for said first party.

The party of the second part will execute and deliver to said party of the first part, a good and valid lease, by the terms of which said second party will lease to said first party a certain parcel of land suitable in size and location and graded in an approved manner for the erection of storage tanks, said parcel to be selected by said second party within the boundary of those certain premises sit-

uated in the County of Los Angeles, State of California, and described as follows:

> The West five (5) acres of the North fourteen (14) acres of the East fifty-five (55) acres of the South half of the Northwest quarter of Section 8, Township 3 South, Range 11 West, San Bernardino Base & Meridian.

IT IS MUTUALLY AGREED AND UNDERSTOOD that said party of the second part is granted the exclusive right and privilege to enter said leased premises upon which said tanks are erected at any time and for any purpose whatsoever, and is granted rights of way for the laying of pipe lines, and/or erecting of poles and the stringing of wires or for any other purpose necessary for the proper conduct of its operation.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 16th day of December, 1931.

WESTER PIPE & STEEL COMPANY OF CALIFORNIA

BY J. E. TERREL

Ass't. Secretary.

Party of the First Part.

EL CAMINO OIL COMPANY, LTD.

BY BERTRAM E. DEVERE

President.

Party of the Second Part.

By VICTOR C. HENRY

Secretary.

[Endorsed]: Filed Oct. 24, 1935 R. S. Zimmerman Clerk By Robert P. Simpson Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

J. N. HENDRICKSON, Plaintiff, -vs- EL CAMINO OIL COMPANY, LTD., a corporation, Respondent.	No. W-21-C. MEMORANDUM OF DECISION

COSGRAVE, District Judge.

The State of California presents its claim against the receiver in equity of the El Camino Oil Company for taxes due it from that company under the Act of 1923, licensing the business of producing and distributing gasoline and other products, together with penalties. The taxes for which claim is made were those due for the quarters ending respectively March 31, June 30, September 30, 1930, and March 31, 1931; the taxes for the two intervening quarters having been paid. Under the law as it existed at that time (Statutes of 1925, p. 659) the tax, if unpaid, became delinquent thirty-five days after the end of the quarter and if not paid on the forty-fifth day a ten percent penalty was added for delinquency. The company was indebted to F. R. Kenney and L. W. Wickes for crude oil furnished in an amount then not ascertained, but which was later determined to be $78,046.60, and on June

6th executed one promissory note to them for $10,000, secured by chattel mortgage upon certain of its equipment, and on June 7th another promissory note for $80,000, secured by a trust deed upon certain real property. Both instruments were recorded in the office of the County Recorder on June 10th following.

In a suit commenced by a creditor, a receiver of the company's property was appointed to conserve its assets for the benefit of all creditors through orderly liquidation. The usual notice was given requiring the presentation of claims. The two note holders presented a claim setting up their notes and security and claiming a first lien upon all of the property described in the chattel mortgage and deed of trust. The State of California presented its claim and claims a lien upon all of the property of the oil company prior and paramount to that of the holders of the mortgage and trust deed. The individual claimants concede the priority of the tax lien for the first quarter, that is for the three months ending March 31, 1930, which became delinquent May 15, 1930, but deny such character to the ten percent added by reason of the penalty. The receiver takes a similar position. The individual claimants deny the priority of the tax lien for the second quarter which became delinquent on August 15, 1930, and for all subsequent quarters, over their contract liens and the receiver supports them in this position.

On May 29, 1931, the attorney general of the State of California, on the request of the state controller, began an action in the Superior Court in Los Angeles County to recover the amount of the unpaid taxes with the penalties in accordance with the provisions of the act, (Stats.

1923, p. 574, section 9). The complaint sets forth the extension of the assessment upon the tax roll of the State Board of Equalization, the delivery of the tax roll to the state controller, a notice by the latter to the delinquent company, and non payment of the taxes and penalties. The lien now claimed by the state is not set up and no relief, other than a money judgment is asked. On June 30, 1931, a stipulation was entered into by which the state might have judgment entered as prayed for at its pleasure. Between May 27, 1930, and January 11, 1932, a total of $85,846.29 was paid by the oil company in varying installments and credited generally without application either by the company or the state officials to any particular item of the tax or penalties.

Two main questions are presented. Is the lien of the state for gasoline sold during the quarters subsequent to March 31, 1930, paramount to the lien created by the mortgage and deed of trust, filed for record on June 10th? Did the State of California by commencing its action on May 29th, 1931, wherein no relief is prayed for with respect to the lien that it now claims, waive such lien?

The act in question (Stats. of California, 1923, p. 571) has been passed upon by the United States Circuit Court of Appeals for the Ninth Circuit. In an opinion written by the late Judge Sawtelle, (Pauley v. State of California, 75 Fed. (2d) 120), the act, although not as of the time here involved, is held valid and the tax thereby created is held an excise tax and not a property tax and the lien created thereby is paramount to the rights of unsecured creditors. The decision does not discuss the tax lien with respect to its priority over that of a secured creditor.

"We are assuming herein that the question of the priority of the state's tax liens over antecedent liens is not involved."

– Pauley v. State of California.
75 Fed. (2d) 120. (132).

In discussing the question as to whether the act created a lien upon the property of the distributor the decision discusses sections 3717, 3718 and 3787 of the Political Code of California, quoting from California Loan etc. Company v. Weis, 118 Cal. 489:

"The mandate of our statutes puts all tax liens upon the same plane, makes them all paramount to other liens, and under sale for their enforcement, gives to the purchaser a title free and unincumbered." (133).

Argument might be made that the decision in Pauley v. State of California, supra, gives to the liens created by the act in question the same priority of the ordinary lien of taxes created by provisions of the Political Code. This, however, is not the case. As specifically noted the lien is discussed in its relation to the claims of unsecured creditors.

The lien created by the provisions of the Political Code for state and county taxes, held by the Supreme Court of California in California Loan etc. Company v. Weis, supra, to be paramount to those created by private contract previous or subsequent to the date of the tax lien, is based upon the provisions of Political Code 3716 and also 3788, as they existed in 1897. The act in question here contains substantially the language of section 3716.

"Said tax shall be a lien upon all the property of the distributor. It . . . shall have the effect of an execution

duly levied . . . and shall remain until the tax is paid or the property sold for the payment thereof."

– Stats. of 1925, p. 659.

The California Supreme Court goes on to say (California Loan etc. Company v. Weis, supra, 495):

"It is held in Eaton's Appeal, 83 Pa. St. 152, that a statute which declares that a tax shall continue a lien 'until fully paid and discharged', ex proprio vigore makes the lien superior to that of a judgment obtained before the tax is levied. In this state we not only have language of similar import in section 2716 (3716) of the Political Code, but that language is aided so as to remove the need of interpretation by section 3788, which provides that the deed conveys the absolute title free from all encumbrances."

California Loan & Trust Co. v. Weis, p. 495.

While it might be urged that the court in the language quoted expresses the view that the language of 3716 is determinative, it is to be noticed that in the opinion of the court that language is aided by the provisions of section 3788.

The Weis case is commented upon and to a certain extent explained by the Supreme Court of the State of California in Guinn v. McReynolds, 177 Cal. 230. In that case the question at issue was the relative priority of the lien created by section 2322-a, Political Code of California, for pest eradication, and private liens. The court held that the lien created under the act did not have such priority because not given by express terms of, or reasonable inference from the statutes.

"But the authorities declare, virtually without dissent, that even a tax lien is not entitled to rank ahead of a pre-existing mortgage, or other contract lien, unless the legislative enactment creating the tax lien has given it priority. (37 Cyc. 1143). The priority need not be declared in express terms. It is enough if the intent to postpone contract liens appear by reasonable inference from the provisions of the act."

"In California Loan and Trust Co. v. Weis, 118 Cal. 489, (50 Pac. 697), it was held that the lien for personal property taxes, imposed by our law upon the real property of the person assessed, was superior to pre-existing encumbrances upon the land. The question, said the court, 'depends for its determination entirely upon statutory enactment,' and the expression of a legislative intent that the tax lien should have priority was found in sections 3716 and 3788 of the Political Code, the former declaring that the lien is not removed until the taxes are paid, or the property sold, and the latter that the tax deed conveys to the grantee the absolute title to the land, free of all encumbrances, excepting liens for subsequent taxes."

– Guinn v. McReynolds, supra 232, 233.

These decisions are important, of course, because the language of the act in question to the effect that the lien remains until the tax is paid or the proprety sold for its payment, is not supplemented by language similar to that found in Political Code 3788. The latter seems decisively to determine the nature of the lien as determined by the California Supreme Court. Without the language of section 3788 it is not a necessary inference that the result of the sale for the tax is to wipe out pre-existing contract

liens. Since the interpretation given to comparable statutes by the highest court of the state makes it at least doubtful that the lien claimed by the state is paramount to pre-existing liens created by private contract, it must be held that the tax lien for the quarters subsequent to March 31, 1930, is not paramount to that created by the mortgage and trust deed.

"However, the legislative intention to make taxes a paramount lien displacing prior liens must be plainly expressed, since such a construction will not be favored."

– Cooley, The Law of Taxation. para. 1240.

By the language of the act, Stats. 1925, p. 659, sec. 4, the lien attaches at the time of the delivery or distribution. The lien of the state must therefore be computed to and including May 10th, 1930, as on that date the mortgage and trust deed were recorded. On the amount found due, however, there must be credited the sum of $85,846.29 actually paid as above narrated.

The individual claimants argue that the state waived its lien by the commencement of the action to recover a money judgment. As the act originally stood, (Stats. 1923, 571) it was the duty of the attorney general at the request of the state controller to prosecute an action to collect the delinquent tax with penalties. The tax was not made a lien upon the property of the distributor. As amended in 1925 it was made such lien although no machinery was provided for the assertion of the lien. The original provision for suit to recover the taxes was how-

ever retained. It is now claimed by the individual claimants that in commencing the suit to recover a money judgment the state waived its right to the lien.

It is a principle in matters of election that before a party who has two courses of action open, by adopting one course is prevented later from pursuing the other, the two remedies must be inconsistent with each other. 20 C. J. p. 20. If the remedies are concurrent and consistent with each other, then he is not estopped. Idem 7. I see nothing inconsistent in the two courses here pursued by the state. It is to be noticed that no judgment was actually entered. The state was at liberty to seek to amend its complaint at any time. The judgment, even if any were entered, would only have the effect of ascertaining the amount due and the liability of the company for its payment. It was not necessarily inconsistent with the sale of the property thereafter to satisfy the lien, at least not at the present stage of the action. 61 Corpus Juris, on the subject of waiver and abandonment in taxation matters, p. 947, states:

"The recovery of a personal judgment for taxes on land against the owner will not extinguish the tax lien." It must therefore be held that by seeking to obtain a money judgment for the amount of the tax the state did not waive its lien.

No distinction it seems to me, can be drawn between the tax due and the penalty. By the language of the Act (Section 4, Stats. of 1925, p. 659) "the amount of such

license tax .... shall become delinquent .... and ten percent penalty shall be added thereto for delinquency." Claimants base their objection to the penalty on the provisions of the Bankruptcy Act, section 57-j, 11USC 93, providing that claims for penalties shall not be allowed for debts owing as a penalty except for the amount of pecuniary loss suffered by the act out of which the penalty arises. (Bankruptcy Act, Section 57, subdivision j). This procedure is controlling so far as bankruptcy is concerned only because expressly made so by the provisions of the act. Such provisions are not necessarily controlling in equity proceedings generally. The language of the act to the effect that the penalty is added means that it has become a part of the tax and cannot be distinguished therefrom. Such is the character that has been uniformly given to penalties under the tax acts by all the courts of California.

The foregoing expresses my views upon all of the substantial questions presented and counsel for the individual claimants will propose and present an order in accordance therewith wherein exception is reserved to all injured parties.

May 8, 1936.

[Endorsed]: Filed May 8, 1936 R. S. Zimmerman Clerk By Francis E. Cross, Deputy Clerk

[Title of Court and Cause.]

ORDER DETERMINING PRIORITY OF LIENS OF THE STATE OF CALIFORNIA, AND F. R. KENNEY AND L. W. WICKES

The petition of the State of California for an order to show cause why claim for taxes should not be allowed as a preferred claim, having been duly presented to the Court, and the Court having issued its order to show cause why the claim of the State of California for taxes should not be preferred and allowed, and the matter having been submitted upon agreed stipulations of facts, and briefs filed, and the Court being fully advised in the premises, and having heretofore filed on the 8th day of May 1936 its memorandum of decision herein, now therefore,

It is hereby Ordered, Adjudged and Decreed:

1. That the claim of the State of California for license taxes in the sum of $252,420.29 for gasoline sold and delivered by the El Camino Oil Company, Ltd., and penalties thereon in the sum of $33,604.91, be and is hereby declared to be a valid and existing claim against the receivership estate.

2. That the claim of the State of California for license taxes in the sum of $252,420.29 for gasoline sold and delivered by the El Camino Oil Company, Ltd., and penalties thereon in the sum of $33,604.91, be and is hereby declared to be a lien upon all of the property of the El Camino Oil Company, Ltd., and such lien shall remain on said property until the license tax for which the same is imposed is paid or the property sold for the payment thereof; that said lien attached upon said property at the

time of the sale and distribution of gasoline by the El Camino Oil Company, Ltd. for which the said license tax is imposed.

3. That the claim of F. R. Kenney and L. W. Wickes in the sum of $78,046.60, together with interest thereon at the rate of seven (7%) per cent per annum, compounded quarterly, from the 31st day of May, 1932, be, and is hereby declared to be a valid and existing claim against the receivership estate.

4. That the claim of F. R. Kenney and L. W. Wickes in the sum of $78,046.60, together with interest thereon at the rate of seven (7%) per cent per annum, compounded quarterly, from the 31st day of May, 1932, is secured by a chattel mortgage dated the 6th day of June, 1930, executed by El Camino Oil Company, Ltd. and recorded in the office of the County Recorder of Los Angeles County the 10th day of June, 1930, and by a deed of trust dated the 7th day of June, 1930, executed by the El Camino Oil Company, Ltd. as Trustor to the Title Insurance and Trust Company, a corporation, as Trustee, in favor of F. R. Kenney and L. W. Wickes as beneficiaries, and recorded in the office of the County Recorder of Los Angeles County on the 10th day of June, 1930; and said chattel mortgage and said deed of trust be, and are hereby declared to be a valid and existing lien upon the property described in said chattel mortgage and said deed of trust.

5. That the sum of $80,733.47 heretofore paid by El Camino Oil Company, Ltd. on account of license taxes due the State of California for gasoline sold and delivered shall be credited on account of license taxes due for

gasoline sold and delivered prior to and including the 31st day of March, 1930.

6. That the lien of the State of California for the unpaid balance of the claim of the State of California for license taxes due on account of gasoline sold and delivered by El Camino Oil Company, Ltd. prior to and including the 31st day of March, 1930, together with unpaid penalties thereon, i. e., a present claim on account of such taxes in the sum of $21,487.43 after crediting the sum of $80,733.47 as provided in paragraph 5 above, and on account of such penalties in the sum of $10,222.09, be, and is hereby declared to be a prior and paramount lien on the property described in said chattel mortgage and said deed of trust ahead of the lien of the claimants F. R. Kenney and L. W. Wickes.

7. That the lien of the State of California for the unpaid balance of the claim of the State of California for license taxes due on account of gasoline sold and delivered by El Camino Oil Company, Ltd. subsequent to the 31st day of March, 1930, and prior to and including the 10th day of June, 1930, i. e., a present claim on account of such taxes in the sum of $75,165.86, be, and is hereby declared to be a prior and paramount lien on the property described in said chattel mortgage and said deed of trust ahead of the lien of F. R. Kenney and L. W. Wickes.

8. That the claim of the State of California for priority of its lien on account of gasoline sold and delivered by the El Camino Oil Company, Ltd. has not been waived.

9. That the claim of F. R. Kenney and L. W. Wickes be, and is hereby declared to be a prior and paramount lien on the property, both real and personal, described in said chattel mortgage and said deed of trust ahead of the lien of the State of California for license taxes due on account of gasoline sold and delivered by the El Camino Oil Company, Ltd. subsequent to said 10th day of June 1930 and penalties thereon.

10. That the stipulations of facts heretofore filed and memorandum of opinion filed May 8, 1936, shall be considered the findings of fact and conclusions of law within the meaning of Equity Rule 70½ (28 U.S.C.A. 723).

Dated: June 15, 1936.

Geo Cosgrave
District Judge.

Approved as to Form

U. S. WEBB,
Attorney General
By John O. Palstine
Deputy Attorney General
Attorneys for and on behalf of the People of the State of California

Earl Glen Whitehead
Attorney for Receiver H. A. Meek

[Endorsed]: Filed Jun. 15, 1936 R. S. Zimmerman Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR RE-HEARING RE PRIORITY OF LIENS OF THE STATE OF CALIFORNIA AND F. R. KENNEY AND L. W. WICKES.

COME NOW the People of the State of California, by and through the Attorney General of said State, tax creditor in the above entitled cause, and move the Court to vacate the order heretofore entered herein on June 15, 1936, determining the priority of the liens of the State of California and of F. R. Kenney and L. W. Wickes, and respectfully pray that said cause relating to the respective claims of said parties be re-heard and reconsidered for the following reasons:

I.

Because of mistakes of fact the Court made in considering the evidence, records, and files herein.

II.

Because of errors in the interpretation and application of the law into which the court was led by a misunderstanding of the facts and of the files and records herein.

III.

Because errors of law apparent upon the face of the record, and in particular because the court erred as follows:

A. In ordering that the claim of F. R. Kenney and L. W. Wickes in the sum of $78,046.60, together with interest thereon at the rate of seven per cent (7%) per annum, compounded quarterly, from the 31st day of May, 1932, is a valid and existing claim against the receivership estate.

B. In ordering that the claim of F. R. Kenney and L. W. Wickes is secured by a chattel mortgaged dated the 6th day of June, 1930, executed by El Camino Oil Company, Ltd., and recorded in the office of the County Recorder of Los Angeles County the 10th day of June, 1930, and is secured by a deed of trust dated the 7th day of June, 1930, executed by the El Camino Oil Company, Ltd., as trustor for the Title Insurance and Trust Company, a corporation, as Trustee, in favor of F. R. Kenney and L. W. Wickes as beneficiary, and recorded in the office of the County Recorder of Los Angeles on the 10th day of June, 1930; and in ordering that said chattel mortgage and said deed of trust are valid and existing liens upon the property described in said chattel mortgage and said deed of trust.

C. In ordering that the claim of F. R. Kenney and L. W. Wickes is a prior and paramount lien on the property both real and personal, described in said chattel mortgage and said deed of trust, ahead of the lien of the State of California for license taxes due on account of gasoline sold and delivered by said El Camino Oil Company, Ltd., subsequent to the 10th day of June, 1930, and penalties thereon.

D. In failing to order that said claim of said State of California should bear interest at the rate of seven per cent (7%) per annum from the times said obligations became delinquent until the same is paid, or from the time when the receiver was appointed herein until said obligation is paid, or from the date of said order determining priority of said liens on June 15, 1936, until paid, with the same priority and lien status as of the principal obligation upon which said interest accrued.

These errors will be plainly apparent to the Court upon a review and further consideration of the record herein, and particularly upon hearing oral argument in regard to said errors, the Court not having had the benefit of such argument prior to the making of said order on July 15, 1936, the matter having been submitted upon briefs. This petition is based upon the files and records herein and upon the briefs heretofore filed herein, all of which are hereby made a part hereof as though set forth herein in full.

For the reasons herein set forth the petitioners pray that the decree of the court, determining the priority of liens of the State of California and of F. R. Kenney and L. W. Wickes be vacated and the cause relating to the respective claims of said parties be re-heard and re-considered, and that to this end the petitioners be permitted by order of this Court to file the foregoing petition, and that the Court fix a time and place for hearing upon said petition for re-hearing, at which hearing the Court may determine whether or not said petition for re-hearing shall be granted or upon what conditions, if any, said petition shall be denied.

Respectfully submitted,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Claimant

By U. S. WEBB,

Attorney General,

John O. Palstine

Deputy Attorney General

Counsel for said Claimant.

WE HEREBY CERTIFY that the foregoing petition is in our opinion well founded in law and should be be granted, and is not interposed for delay.

U. S. WEBB,
Attorney General
By John O. Palstine
Deputy Attorney General
Counsel for Petitioner.

ORDER FOR HEARING ON PETITION FOR RE-HEARING

UPON READING the foregoing petition for re-hearing and good cause therefor appearing,

IT IS HEREBY ORDERED that said petition be, and the same is hereby filed and it is further ordered that hearing thereon be had on Monday, the 20th day of July, 1936, at 10 o'clock A. M., or as soon thereafter as the matter can be heard by the Court, in the Court Room of the Honorable George Cosgrave, United States District Judge, in the Federal Building, Los Angeles, California.

IT IS FURTHER ORDERED that the petitioner, the People of the State of California, shall give five days' notice of said hearing to H. A. Meek, receiver in the above entitled proceeding, and to said F. R. Kenney and L. W. Wickes, by service of a copy of the petition upon which this order is made and a copy of the order, on each of said parties or his counsel of record herein.

DATED: Los Angeles, California, July 13, 1936.

Geo Cosgrave
UNITED STATES DISTRICT JUDGE

[Endorsed]: Filed Jul. 16, 1936 R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

At a stated term, to-wit: The February Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif., on Monday, the 31st day of August, in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable: GEO COSGRAVE District Judge.

J. E. Hendrickson,	Plaintiff,)	
	)	
vs.	)	No. W-21-C Eq.
	)	
El Camino Oil Co.,	)	
Ltd., a corporation,	Defendant..)	

This cause having come before the Court on August 27th, 1936, for hearing on Petition of People of the State of California for rehearing, filed July 16th, 1936, re priority of liens of State of California and F. R. Kenney and *I.* W. Wickes, and having been aruged by counsel and ordered submitted for decision; and the Court, having duly considered the matter, now orders as follows:

Petition of the State of California for re-hearing is denied. Exception to petitioner.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL

TO THE HONORABLE GEORGE COSGRAVE, JUDGE OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The State of California, creditor and appellant herein, feeling itself aggrieved by the order of the above entitled court, dated June 15, 1936, allowing the claims of the State of California and of F. R. Kenney and L. W. Wickes, and determining the existence and priority of liens securing said claims, respectively, and feeling itself further aggrieved by the order of said court dated August 21, 1936, denying the petition of said State for a rehearing upon the matters determined by said order of June 15, 1936, and upon the matter of the right of the State of California to interest upon its claim,

PRAYS FOR THE ALLOWANCE OF AN APPEAL from said order of June 15, 1936, relating to said claims and liens, and from said order of August 31, 1936, denying said petition for rehearing, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith, and prays that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said orders were based, duly authenticated, be sent to said Circuit Court of Appeals, and prays that an

order be made fixing the amount of any bond required of appellant herein.

DATED: September 30, 1936.

U. S. WEBB,
Attorney General,
By John O. Palstine
Deputy Attorney General,
Attorneys for the State of California, creditor and appellant.

ORDER ALLOWING APPEAL

Upon reading the foregoing Petition for Appeal, and upon the files and records herein,

IT IS ORDERED that an appeal be, and the same is hereby allowed to the State of California, to have the United States Circuit Court of Appeals, for the Ninth Circuit, review the order of this court dated June 15, 1936, relating to the claims of the State of California and of F. R. Kenney and L. W. Wickes, as creditors of the El Camino Oil Company, Ltd., a corporation, respondents herein, and relating to the existence and priority of liens securing said claims, and also to review the order of this court dated August 31, 1936, denying a petition of said State of California, for a rehearing in connection with the matters determined by said order of June 15, 1936, and

IT IS FURTHER ORDERED that citation be issued as provided by law, directed to H. A. Meek, as Receiver

of the El Camino Oil Company, Ltd., and F. R. Kenney and L. W. Wickes, creditors, as appellees, and that a transcript of the record be prepared by the clerk of this court and transmitted to the Circuit Court of Appeals, so that he shall have the same in said Circuit Court within thirty days of this date, or such further time as may be fixed by order of this court duly made and entered.

IT IS FURTHER ORDERED that cost bond in said appeal be and the same is hereby fixed in the sum of $250.00 Dollars, the clerk to approve said bond.

DATED: September 30, 1936.

Geo. Cosgrave
District Judge.

[Endorsed]: Filed Sep. 30, 1936 R. S. Zimmerman, Clerk by Edmund L. Smith Deputy Clerk

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

. . . . .

J. N. HENDRICKSON,	)	
	)	
Complainant,	)	
	)	No. W-21-C.
vs	)	
	)	ASSIGNMENT
EL CAMINO OIL COMPANY, LTD., a corporation,	)	OF ERRORS.
	)	
	)	
Respondent.	)	

COMES NOW the State of California, creditor and appellant herein and respectfully urges that the above entitled court erred in making its order of June 15, 1936, relating to the claims of the State of California and of F. R. Kenney and L. W. Wickes, as creditors of the El Camino Oil Company, Ltd., a corporation, respondent herein, and relating to the existence and priority of liens securing said claims, and also erred in making its order of August 31, 1936, denying the petition of said state for a re-hearing in connection with the matters determined by said order of June 15, 1936, and presents in connection with its petition for appeal from said order, the following assignment of errors:

I.

That said court erred in ordering that the claim of F. R. Kenney and L. W. Wickes in the sum of $78,046.60, together with interest thereon at the rate of seven per cent

(7%) per annum, compounded quarterly from the 31st day of May, 1932, is a valid and existing lien against and upon any of the property in the receivership estate.

II.

That said court erred in ordering that the claim of F. R. Kenney and L. W. Wickes, or any portion thereof, is secured by a chattel mortgage dated the 6th day of June, 1930, executed by El Camino Oil Company, Ltd., and recorded in the office of the County Recorder of Los Angeles County the 10th day of June, 1930.

III.

That said court erred in ordering that said chattel mortgage created and constitutes a valid and existing lien upon the property described in said chattel mortgage.

IV.

That said court erred in ordering that said chattel mortgage created and constitutes a valid and existing lien upon any of the property in said receivership estate.

V.

That said court erred in ordering that said claim of F. R. Kenney and L. W. Wickes constitutes a lien upon the property described in said chattel mortgage, prior and paramount to the lien of the State of California upon said property for penalties added to license taxes due on account of motor vehicle fuel sold and delivered by said El Camino Oil Company, Ltd., from and including the 1st day of April, 1930, to and including the 10th day of June, 1930.

VI.

That said court erred in ordering that said claim of F. R. Kenney and L. W. Wickes constitutes a lien upon

the property described in said chattel mortgage, prior and paramount to the lien of the State of California upon said property for license taxes due on account of motor vehicle fuel sold and delivered by said El Camino Oil Company, Ltd., subsequent to the 10th day of June, 1930, together with penalties thereon for delinquency.

VII.

That said court erred in ordering that said claim of F. R. Kenney and L. W. Wickes, or any portion thereof, constitutes a lien upon any property in this receivership estate, prior and paramount to any lien of the State of California.

VIII.

That said court erred in ordering that the claim of said F. R. Kenney and L. W. Wickes, or any portion thereof, is secured by a deed of trust dated the 7th day of June, 1930, executed by the El Camino Oil Company, Ltd., as trustor for the Title Insurance and Trust Company, a corporation, as trustee, in favor of F. R. Kenney and L. W. Wickes as beneficiaries and recorded in the office of the County Recorder of Los Angeles County on the 10th day of June, 1930.

IX.

That said court erred in ordering that said deed of trust created and constitutes a valid and existing lien, as against the State of California, upon the property described in said deed of trust.

X.

That said court erred in ordering that said deed of trust created and constitutes a valid and existing lien, as against the State of California, upon any of the property in said receivership estate.

XI.

That said court erred in ordering that said claim of F. R. Kenney and said L. W. Wickes constitutes a lien upon the property described in said deed of trust prior and paramount to the lien of the State of California upon said property for penalties added to license taxes due on the amount of motor vehicle fuel sold and delivered by El Camino Oil Company, Ltd., from and including the 1st day of April, 1930, to and including the 10th day of June, 1930.

XII.

That said court erred in ordering that said claim of F. R. Kenney and said L. W. Wickes constitutes a lien upon the property described in said deed of trust prior and paramount to the lien of the State of California upon said property for license taxes due on account of motor vehicle fuel sold and delivered by said El Camino Oil Company, Ltd., subsequent to the 10th day of June, 1930, together with penalties thereon for delinquency.

XIII.

That said court erred in ordering that said deed of trust created and constitutes a valid and existing lien upon

certain property, legal title to which was not vested in said El Camino Oil Company, Ltd., prior to the date of the order herein appointing a receiver for said corporation, but to which property the legal title was vested in other persons than either said receiver or said respondent or said F. R. Kenney and L. W. Wickes, until the legal title thereto was acquired by said receiver after his appointment as such receiver in these proceedings.

XIV.

That the said court erred in ordering that the sum of $80,733.47 paid by said El Camino Oil Company, Ltd., on account of its obligation to the State of California, which payment was made prior to the appointment of the receiver herein, should be credited on account of the license taxes due for gasoline sold and delivered prior to and including the 31st day of March, 1930.

XV.

That said court erred in failing to order that said sum so paid by said El Camino Oil Company, Ltd., should be credited first on account of penalties added to the amount of the license taxes due for gasoline sold and delivered prior to and including the 31st day of March, 1930.

XVI.

That said court erred in failing to specify, on the basis of the facts recited in the stipulation herein, the property now in the hands of the receiver herein, to which the alleged lien of said deed of trust would attach.

XVII.

That said court erred in failing to order that the State of California is a preferred creditor of the receivership estate and as such is entitled to first distribution of property in the receivership estate not subject to liens of creditors, such distribution to be applied on account of the obligation to said state which would not otherwise be paid by the satisfaction of its lien from the property subject thereto as a paramount lien.

XVIII.

That said court erred in failing to order the allowance and payment of interest at the rate of seven per cent (7%) per annum, upon the tax claim of said state, from the times said obligations became delinquent until the *said* is paid.

XIX.

That said court erred in failing to order the allowance and payment of interest at the rate of seven per cent (7%) per per annum, upon the tax claim of said state, from the time said obligation was allowed as a proper claim herein until the same is paid.

DATED: September 30, 1936.

U. S. WEBB,
Attorney General,

By John O. Palstine
Deputy Attorney General.

Attorneys for State of California.

[Endorsed]: Filed Sep. 30, 1936 R. S. Zimmerman Clerk, By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS that the undersigned, AMERICAN SURETY COMPANY OF NEW YORK, a corporation, duly organized and existing under the laws of the State of New York, having its principal place of business at 100 Broadway, New York City, New York, and duly authorized to transact a general surety business in the State of California, is held and firmly bound unto H. A. Meek, Receiver of El Camino Oil Company, Ltd., a Corporation, and F. R. Kenney and A. W. Wickes, Appellees, in the penal sum of TWO HUNDRED FIFTY AND NO/100 DOLLARS ($250.00), for the payment of which said Surety binds itself and its successors, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, lately at a regular term of the District Court of the United States for the Southern District of California, Central Division, sitting at the City of Los Angeles in said District, in a suit pending in said Court between J. N. Hendrickson, Plaintiff, and El Camino Oil Company, Ltd., a Corporation, as Respondent, being Equity No. W-21-C in Equity on the docket of said Court, an order was entered on or about June 13, 1936, determining the priority of liens of the State of California and F. R. Kenney and L. W. Wickes and on August 31, 1936, an order was entered denying the petition of the State of California for a rehearing in regard to the matters determined by the aforesaid order of June 13, 1936, and

WHEREAS, the said State of California, Appellant, has been allowed an appeal from said orders, and a citation has been issued directed to H. A. Meek, Receiver of the El Camino Oil Company, Ltd., a Corporation, and F. R. Kenney and L. W. Wickes, Appellees, citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California.

NOW, THEREFORE, if the said State of California, Appellant, shall prosecute its appeal to effect and answer all costs and damages that may be awarded against it on said appeal, if it fails to make its appeal good, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, said Surety has caused this instrument to be executed and its seal to be hereunto affixed by its duly authorized officers in the City of Los Angeles, State of California, District aforesaid, this 10th day of November, 1936.

AMERICAN SURETY COMPANY
OF NEW YORK

By A. M. Wold A. M. Wold

[Seal] Resident Vice President

Attest: I. Taylor I. Taylor

Resident Assistant Secretary

Premium charged for this bond is $10.00 per annum.

State of California,)
) s.s.
COUNTY OF LOS ANGELES)

On this 10th day of November, A. D. 1936, before me, John Gurash, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. M. Wold personally known to me to be the Resident Vice-President and I. Taylor personally known to me to be the Resident Assistant Secretary of the AMERICAN SURETY COMPANY OF NEW YORK, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] John Gurash

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Feb. 18, 1940

I hereby approve the foregoing bond.

Dated the 16th day of Nov. 1936.

Geo. Cosgrave
Judge

[Endorsed]: Filed Nov. 16, 1936 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

YOU WILL PLEASE PREPARE A TRANSCRIPT OF THE RECORD ON APPEAL in the above entitled cause, including therein the following portions only of the record:

1. Petition for order to show cause why claim for taxes should not be allowed as a preferred claim;
2. Order to Show Cause why preferred claim of State of California for taxes should not be allowed and distribution made to said State;
3. Answer to said Order to Show Cause and said Petition;
4. Stipulated statement of facts, dated on or about April 30, 1935;
5. Stipulation as to additional facts, dated September 30, 1935;
6. Memorandum of decision, dated May 8, 1936;
7. Order determining priority of liens of the State of California and F. R. Kenney and L. W. Wickes, dated June 13, 1936;

8. Petition for rehearing re priority of liens of the State of California and F. R. Kenney and L. W. Wickes;

9. Minute Order of August 31, 1936, denying petition for rehearing.

10. Assignment of errors.

11. Petition for appeal and order allowing appeal;

12. Bond on appeal;

13. Citation;

14. Praecipe.

Dated: September 30th, 1936.

U. S. WEBB,
Attorney General

By JOHN O. PALSTINE
John O Palstine
Deputy Attorney General,

Attorneys for the State of California, Appellant.

IT IS HEREBY STIPULATED that the foregoing shall constitute the transcript of record on this appeal, and that instead of writing and copying the names and titles of the Court, complainants and defendants, and the number of the cause, the same may, in said transcript of record, be abbreviated as follows: [Title of Court and Cause]; and that there need not be included in said transcript of record the backs and endorsements which appear on the original covers, save and except the filing endorsement of the clerk.

Dated this 10th day of November, 1936.

U. S. WEBB,
Attorney General,
By:
JOHN O. PALSTINE
John O. Palstine
Deputy Attorney General
Attorneys for the State of California, Appellants.

A. Maxson Smith
Attorney for F. R. Kenney and L. W. Wicks, Appellees.

Earl Glen Whitehead
Attorney for H. A. Meek, Receiver, Appellee.

[Endorsed]: Filed Nov. 13, 1936 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 107 pages, numbered from 1 to 107 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; petition for order to show cause why claim for taxes should not be allowed as a preferred claim; order to show cause; answer to order to show cause; stipulated statement of facts; stipulation as to additional facts; memorandum of decision; order determining priority of liens of the state of California, and F. R. Kenney and L. W. Wickes; petition for rehearing and order for rehearing; order of August 31, 1936, denying petition for rehearing; petition for appeal and order allowing appeal; assignment of errors; bond on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certi-

fying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixty-first.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8409.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

J. N. HENDRICKSON,
Complainant,

vs.

EL CAMINO OIL COMPANY, LTD., a corporation,
Respondent.

STATE OF CALIFORNIA,
Creditor and Appellant,

vs.

H. A. MEEK, as Receiver of the El Camino Oil Company, Ltd., a corporation,
Receiver and Appellee,

F. R. KENNEY and L. W. WICKES,
Creditors and Appellees.

APPELLANT'S OPENING BRIEF

U. S. WEBB,
Attorney General,

By JOHN O. PALSTINE,
Deputy Attorney General,
Attorneys for State of California, Creditor and Appellant.

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IN THE

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IN AND FOR THE

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a corporation,
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vs.

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Receiver and Appellee,

F. R. KENNEY and L. W. WICKES,
Creditors and Appellees.

APPELLANT'S OPENING BRIEF

I. STATEMENT OF JURISDICTION

This is an appeal from an order (Tr. pp. 84-87) of the District Court of the United States, Southern District of California, Central Division, determining the existence and relative priority of liens of the appellant, the State of California, and of the appellees F. R. Kenney and L. W. Wickes, respectively, upon property in the possession of the appellee

H. A. Meek, as receiver of the respondent El Camino Oil Company, Ltd.

Said receiver was appointed in a suit commenced by a creditor, to conserve the assets of the debtor, the El Camino Oil Company, Ltd., for the benefit of all creditors, through orderly liquidation. The usual notice was given requiring the presentation of claims. Two individual claimants, F. R. Kenney and L. W. Wickes, (hereinafter referred to as the individual claimants or contract creditors), presented a joint claim setting up their claim based upon two promissory notes executed by the debtor corporation and secured, respectively, by a chattel mortgage and a deed of trust upon certain property of said corporation. The State of California presented its claim for taxes and penalties thereon, secured by a lien therefor as provided by the tax statute, upon all of the property of said debtor corporation. (See opinion of District Court, Tr. p. 76, which opinion is adopted (Tr. p. 87) as a part of the findings and conclusions of said court).

Thereafter, the State of California filed in said receivership proceeding its petition for an order to show cause why its claim for taxes should not be allowed as a preferred claim and as a lien claim paramount to the claims and liens of other creditors of the respondent corporation. (Tr. pp. 3-4.) An order to show cause was duly issued pursuant to said petition. (Tr. pp. 5-6.) H. A. Meek, as receiver for said El Camino Oil Company, Ltd.,

duly filed his answer to said order to show cause, (Tr. pp. 7-13) and the matter was submitted to said district court upon a stipulated statement of facts (Tr. pp. 14-22) and exhibits attached thereto (Tr. pp. 22-43); as supplemented by a further stipulation as to additional facts (Tr. pp. 44-47), with exhibits attached thereto (Tr. pp. 48-74.) By this further stipulation the attorneys for the aforesaid appellees F. R. Kenney and L. W. Wickes joined in said stipulation and also in the original stipulation of facts hereinabove referred to (Tr. p. 47), and thereby submitted to the jurisdiction of said district court under said petition and order to show cause.

Said district court rendered and filed its memorandum of decision (Tr. pp. 75-83), pursuant to which the order herein appealed from was made. (Tr. pp. 84-87.) Said order adopted said stipulations and said memorandum of decision as the findings and conclusions of law of the court. (Tr. p. 87.) A petition for rehearing (Tr. pp. 88-91) was denied (Tr. p. 92), and the state of California thereupon filed in said district court its petition for appeal (Tr. pp. 93-94), supported by assignments of error (Tr. pp. 96-101), whereupon said district court duly made its order allowing said appeal to this court. (Tr. pp. 94-95.)

Under the foregoing pleadings and facts, the jurisdiction of said district court in said receivership proceeding is sustained by section 24, sub-

division (1), of the Judicial Code. (28 U. S. C. A. Sec. 41). Having thus taken jurisdiction of said proceeding, the district court had jurisdiction to decide all questions incident to the preservation, collection, and distribution of the assets of the debtor.

See *Riehle* vs. *Margolies,* 279 U. S. 218, 49 S. Ct. 310, 312, 73 L. Ed. 669 (1929).

The jurisdiction of this court, upon appeal, to review said order, is sustained by sections 128 and 129 of the Judicial Code (28 U. S. C. A. Secs. 225, 227).

II. STATEMENT OF THE CASE

A. The Facts

As has been stated, the facts were stipulated to in detail, and are set forth in the transcript of record. (Tr. pp. 14-74.) In its order (Tr. p. 87), the court adopted said stipulations and its memorandum of decision (Tr. pp. 75-83), as its findings of fact and conclusions of law. In giving a brief summary of the facts pertinent upon this appeal reference will therefore be made to both said stipulations and said memorandum of decision.

During the quarter years ending March 31, June 30, and September 30, 1930, and March 31, 1931, respectively, the El Camino Oil Company, Ltd., became indebted to the state of California for taxes on account of motor vehicle fuel distributed by

said company during said periods. Said taxes were assessed pursuant to the provisions of the California Motor Vehicle Fuel License Tax Act (Calif. Stats, 1923, p. 571, as amended, and Calif. Stats. 1927, p. 1565). None of said taxes was paid prior to the respective dates of delinquency, and a 10 per cent penalty was thereupon added to each of said taxes as provided in said act, and was entered upon the assessment roll by the Controller of the State of California. (Tr. pp. 14-16, 75.) Since May 15, 1930, certain sums have been paid to the State of California by said El Camino Oil Company, but there remains a large balance on account of each of said quarterly taxes. (Tr. pp. 16-17.)

On June 6, 1930, said El Camino Oil Company executed and delivered to the appellees F. R. Kenney and L. W. Wickes a promissory note in the amount of $10,000, and at the same time executed and delivered to said appellees a chattel mortgage to secure the payment of said note. (Tr. pp. 22-28, 75-76.) On June 7, 1930, said company executed and delivered to said individual creditors its promissory note in the amount of $80,000, and at the same time executed and delivered a deed of trust to secure the payment of said note. (Tr. pp. 28-41, 76.) Each of said encurbrances was recorded in the official records of the county recorder's office of the county of Los Angeles, California, on June 10, 1930. (Tr. pp. 18, 76.) The consideration for said notes was a then existing

indebtedness by said company to said appellees for crude oil furnished said company by said appellees in an amount not then ascertained but which was later determined to be $78,046.60. (Tr. pp. 18-19, 75-76.)

The deed of trust purportedly transferred in trust two "parcels." The first was a parcel of land owned by the El Camino Oil Company, and particularly described in said deed. (Tr. p. 28.) The second was said company's right, title and interest, *as lessee,* in a certain lease covering the premises upon which was and is situated the oil refinery of said El Camino Oil Company. Said deed of trust after particularly describing said Parcel II, further provided

> "that all that certain oil refinery located upon Parcel II above described and all that certain bulk plant located upon Parcel I above described, including all machinery, equipment and fixtures and all tanks, vats, pumps, boilers, engines, meters, pipes, stills, and fractionating towers now situated upon the above described premises, or either of them, in whatever manner affixed or attached to either of said parcels of real property, are and shall be deemed to be real property and expressly included in the above grant, transfer and assignment."

Said instrument was executed by said El Camino Oil Company, by the signatures of its president and secretary, who likewise acknowledged before a notary public "that such corporation executed

the same." (Tr. pp. 38-39.) Said trust deed was not, however, accompanied by the affidavit of all or any of the parties thereto that it was made in good faith and without any design to hinder, delay or defraud creditors. (Tr. pp. 38-39.) Nor was there ever any transfer of possession of any of the property described in said trust deed, to either the trustee or the beneficiary named therein. In other words, said El Camino Oil Company was continuously in possession of all of said property at all times mentioned until possession of the same was taken by the receiver. (Tr. pp. 46-47.)

Said El Camino Oil Company was not at any time, and is not now, the owner of the real property described as Parcel II in said deed of trust, but its only interest in said premises was and is under and by virtue of a certain lease, a copy of which is set forth in the transcript of record. (Tr. pp. 44, 48-68.) At the time said lease was made, said premises were vacant and unimproved. Thereafter, however, and prior to the date of any of the distributions for which the aforesaid taxes were levied, said oil company erected and installed thereon, its refinery plant and equipment. The lease provided that upon the expiration of its term the lessee should yield up the premises to the lessor in as good condition as the same were at the commencement of said term, reasonable use and wear thereof excepted. However, the lessor expressly covenanted

> "That the boilers, engines, machinery, tanks, vats, stills, pipes, equipment and fixtures, and all

personal property erected on said leased premises by the lessee may be removed by the lessee at the termination of this lease, or any extension thereof, even though the same may be attached to said premises: Provided, the lessee shall not then be in default in the performance of the covenants hereof; and provided further, that the removal of any such property shall be effected before the expiration of said term, or any extension thereof, and all damages caused to said premises by such removal shall be repaired by the lessee on or before the expiration of said term." (Tr. p. 54.)

All of the property now in the possession of the receiver was at all times during which the aforesaid taxes accrued, owned by said company or in the possession and use of said company under purchase contracts reserving title in the vendor for the purpose of security until payment in full of the purchase price. (Tr. p. 45.) Since the inception of the receivership, all balances due on said contracts have been paid by the receiver from moneys received under a lease of the refinery of the said El Camino Oil Company, which lease was made by the receiver. (Tr. p. 46.)

B. The Questions Involved on This Appeal

Upon the foregoing facts, and pursuant to the proceedings had as heretofore related, the district court ruled that the State of California had a valid and existing claim against the receivership estate for taxes in the sum of $252,420.29, on account of

gasoline sold and delivered by the El Camino Oil Company, Ltd., and for penalties thereon in the sum of $33,604.91. This entire claim was declared to be a lien upon all of the property of said company, attaching as of the time of the sale and distribution of gasoline by said company on account of which said taxes were imposed, and remaining until the license tax for which said lien was imposed is paid or the property sold for the payment thereof. (Tr. pp. 84-85.) No appeal has been taken from this portion of the district court's order.

The district court further held that the appellees F. R. Kenney and L. W. Wickes, also had a valid and existing claim against the receivership estate, in the sum of $78,046.60, together with interest thereon at the rate of 7 per cent per annum, compounded quarterly from the thirty-first day of May, 1932, and that said claim is secured by the aforesaid chattel mortgage of June 6, 1930, and deed of trust of June 7, 1930, which were specifically declared to be "a valid and existing lien upon the property described in said chattel mortgage and deed of trust." (Tr. p. 85.) The State of California has appealed from this portion of said order. First, it contends that no portion of the claim of said appellees is or was at the commencement of the receivership proceedings herein, secured by said chattel mortgage. (See Assignment of Error, II; Tr. p. 97.) This contention is based upon the ground that the $10,000 note which was secured by said chattel mortgage, was fully satisfied by the

accounting had between the parties thereto, subsequent to the execution of said instrument, by which accounting the amount of the indebtedness of the El Camino Oil Company to said individual creditors was ascertained to have been $78,046.60 only, or, in other words, in an amount less than that of the note purportedly secured by the deed of trust, which was of later date than either the $10,000 note or chattel mortgage.

The State of California further contends that, as to the property described as Parcel II in said deed of trust, namely, the interest of said El Camino Oil Company, as lessee, in certain real property particularly described therein, said instrument did not create a valid lien as against the State of California. (See Assignment of Error, IX; Tr. p. 98.) This contention is based upon the ground that the property described in said deed of trust as Parcel II is personalty rather than realty, and said trust deed was not executed in the manner required for mortgages of personal property.

Having held that both the State of California as tax claimant, and said contract creditors, held valid and existing liens upon the property in the possession of the receiver, the district court held that the lien of the State of California for the unpaid balance of the claim of said state for license taxes due on account of gasoline sold and delivered by the El Camino Oil Company, Ltd., during the first period involved, viz, prior to and including March 31, 1930, was prior and paramount to the lien of

said individual creditors under the aforesaid chattel mortgage and deed of trust. (Tr. p. 86.) No appeal has been taken from this portion of said order.

As to the portion of the claim of the State of California which was for license taxes due on account of gasoline sold and delivered by the El Camino Oil Company during the second period involved, viz, subsequent to the thirty-first day of March, 1930, but prior to and including the tenth day of June, 1930, the district court held that the lien securing said tax claim was prior and paramount to the aforesaid contract lien of the appellees, Kenney and Wickes. (Tr. p. 56.) No appeal has been perfected from this portion of said order. However, the district court did *not* order that the state's lien for *penalties* which subsequently were added to the assessment roll on account of the failure to pay said taxes which accrued during this second period, was prior and paramount to the lien of said contract creditors. The State of California contends that although said penalties were not added upon the assessment roll until after said chattel mortgage and deed of trust were recorded, on June 10, 1930, the *lien* for said penalties attached, as did the lien for the taxes to which said penalties were so added, as of the date of the delivery of the gasoline on account of which said taxes accrued, to wit, *prior* to June 10, 1930. (See Assignments of Error V and XI; Tr. pp. 97, 99.)

As to the portion of the claim of the State of California which was for license taxes due on account of gasoline sold and delivered by the El Camino Oil Company during the third period involved, viz, subsequent to the tenth day of June, 1930, the district court held that the lien of the state, for both said taxes and the penalties thereon, was subsequent and inferior to the lien of said individual creditors under said chattel mortgage and deed of trust. (Tr. p. 87.) The State of California contends that, even if it be assumed that the claim of said contract creditors was secured by said chattel mortgage, and that said deed of trust is valid as against the State of California, the lien securing the claim of the State of California, in its entirety, was nevertheless prior and paramount to any such lien created by said chattel mortgage (See Assignment of Error VI; Tr. pp. 97-98), and said deed of trust. (See Assignment of Error XII; Tr. p. 99.) In other words, it is contended that, in any event, *the state's tax lien is paramount to even antecedent contract liens.*

Briefly, then, the questions involved in this appeal are as follows:

1. Where a debtor, who is indebted to a creditor in an unascertained amount, satisfies said unliquidated debt by the execution, on one day, of a $10,000 note secured by a chattel mortgage, and by the execution, on the following day, of an $80,000 note secured by a deed of trust of even date, and

it is thereafter ascertained, by an accounting between said parties that the amount of the indebtedness is and was in fact only $78,046.60, must the court, in applying the credit in the amount of $11,-853.40 to which the debtor is thus entitled, first apply said credit to the satisfaction of said $10,000 note secured by said chattel mortgage?

2. Where a debtor, in order to secure its promissory note, grants, conveys, transfers, assigns, and sets over, in trust, all of his right, title and interest *as lessee* in and to certain real property, and there is no transfer of possession of said leasehold estate, nor is the instrument by which such assignment in trust is made, executed and recorded in the manner required for the execution and recording of mortgages of *personal property,* is such encumbrance valid as against the State of California as a tax creditor of said debtor?

3. Where a motor vehicle fuel tax accrues and becomes a lien upon the property of the distributor as distributions of such fuel are made (although the tax is not assessed until a later date, after which date a penalty is added to the tax upon the assessment roll, for failure to pay said tax before the delinquency date), does the lien for the *penalty* on said tax attach as of the date of the distribution of said fuel, as did the lien for the taxes to which said penalties were added?

4. Where, pursuant to the provisions of the California Motor Vehicle Fuel License Tax Act, taxes

accrue and become a lien upon the property of the tax debtor subsequent, in point of time, to the time when instruments creating private contract liens on certain property of said debtor are recorded, is said tax lien *paramount* to said antecedent contract liens?

It is apparent, of course, that if this court holds, as appellant believes it must, that the entire lien of the State of California is paramount to any and all liens which the individual creditors may have upon the property of the debtor company, then a decision upon the first three questions stated above would not be necessary in order to require a reversal of the order of the district court. For it is immaterial what valid liens the individual creditors may have, and it is not necessary to determine when the lien for penalties attached, if the state's lien is, in any event, paramount to even *antecedent* contract liens which are *valid* as against the state.

III. SPECIFICATIONS OF ERROR

The foregoing questions will each be considered separately in the order mentioned. In presenting said questions, appellant relies upon the following assignments of error:

Point One, Assignment II, (Tr. p. 97);

Point Two, Assignment IX, (Tr. p. 98);

Point Three, Assignments V and XI, (Tr. pp. 97, 99);

Point Four, Assignments VI and XII, (Tr. pp. 97-98, 99).

IV. ARGUMENT OF APPELLANT

A. Point One

The district court erred in ordering that the claim of F. R. Kenney and L. W. Wickes, or any portion thereof, is secured by a chattel mortgage dated the sixth day of June, 1930, executed by El Camino Oil Company, Ltd., and recorded in the office of the county recorder of Los Angeles County the tenth day of June, 1930.

This point relates to Assignment of Error No. II. (Rep. Tr., p. 97.)

As has been noted, on June 6, 1930, the El Camino Oil Company, the respondent herein, executed and delivered to the appellees Kenney and Wickes, its $10,000 note, purportedly secured by a chattel mortgage of even date. (Tr. pp. 22-28, 75-76.) Then, on June 7, 1930, an additional promissory note was executed in favor of said appellees in the amount of $80,000. This note was purportedly secured by a deed of trust of the same date. (Tr. pp. 75-76, 18, 38.) At the time said notes were executed the exact balance due individual creditors by the oil company was not known, but said notes were made in the aforesaid amounts in order to amply cover the indebtedness which would thereafter be fixed by said parties. Thereafter, pursuant to this understanding, it was ascertained that the correct amount of the indebtedness by the respondent oil company to said individual creditors was, at all of said times, in the amount of $78,046.60, only. (Tr. pp. 18 to 19.) Thus the

respondent oil company was entitled to a credit of $11,953.40 upon the obligations evidenced and secured by the aforementioned documents. The contention of the State of California is that said credit must first be applied by the court to the payment of said $10,000 note secured by said chattel mortgage, thus, in effect, leaving no such obligation at the time of the receivership proceeding herein.

Section 1479 of the California Civil Code provides as follows:

> "Application of general performance. Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:
>
> One. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.
>
> Two. If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the

creditor cannot be rescinded without the consent of the debtor.

Three. If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

1. Of interest due at the time of the performance.
2. Of principal due at that time.
3. Of the obligation earliest in date of maturity.
4. Of an obligation not secured by a lien or collateral undertaking.
5. Of an obligation secured by a lien or collateral undertaking."

It is uncontroverted, in the principal case, that neither party to the above mentioned notes made any particular application of the credit to which the debtor oil companies became entitled by reason of the accounting, had as aforesaid. It is therefore necessary for the *court* to apply said credit in accordance with the provisions of paragraph three of said section 1479. That said section relates to payments by way of "credits" to which the debtor is entitled, as well as to any other payments, is settled in the case of *McColgan* vs. *Sockolov,* 192 Cal. 171 (1923). There, it was squarely held that where the maker of several notes is entitled to credit on said notes or some of them, for services performed, the

credit should be applied against the notes bearing the *earliest date*, in accordance with the method outlined by the aforesaid code section 1479.

Applying said code section and said decision to the principal case, it is evident that the credit to which the respondent oil company was entitled must first be applied upon the $10,000 note, that being the obligation earliest in date of maturity. Accordingly, it must be held that there is no sum due on account of said $10,000 note secured by said chattel mortgage. The district court, therefore, erred in ordering that the claim of said contract creditors is now secured by said chattel mortgage. Its order should be modified accordingly.

B. Point Two

Said district court erred in ordering that the deed of trust executed June 7, 1930, by the El Camino Oil Company, created and constitutes a valid and existing lien, as against the State of California, upon the property described in said deed of trust as Parcel II.

This point relates to the error assigned as Number IX, in the assignment of errors filed herein. (Tr. p. 98.)

Briefly summarized, the proposition here presented by the appellant is that, whatever may be the effect of the deed of trust heretofore referred to, as between the parties thereto, it was of no effect as against the State of California, as to the property described therein as Parcel II, because said

state did not have notice of said encumbrance, either actual or constructive. The lack of *actual* notice is not disputed. The state contends that it did not receive any *constructive* notice of any encumbrance upon said property described as Parcel II, because there was neither any transfer of possession of said property, nor did the parties to said deed of trust comply with the laws of the State of California relating to the execution and recordation of instruments creating encumbrances upon personal property. The validity of this contention of the State will more clearly appear from the following argument.

By said trust deed the El Camino Oil Company as trustor conveyed to the trustee, as Parcel I, a certain parcel of land in the county of Los Angeles, State of California. (Tr. p. 28.) Continuing, said instrument provided that the trustor also granted, conveyed, transferred, assigned and set over to the trustee, in trust with power of sale, "all that property in the county of Los Angeles, State of California, described as:

> "All Trustor's right, title and interest *as Lessee,* in and to that certain written lease dated September 16, 1929, between Matilda E. Richer, Lessor, and El Camino Oil Company, a corporation, Lessee, pertaining to and covering
>
> Parcel II: The West Five (5) acres of the North Fourteen (14) acres of the East Fifty-five (55) acres of the South Half ($S\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 8.

Township 3 South, Range 11 West, San Bernardino Base and Meridian.

which said lease was recorded on the 24th day of September, 1929 in Book 9300, page 229 of Official Records in the office of the County Recorder of Los Angeles County, State of California, including Trustor's right under said lease to purchase said premises upon the terms and conditions set forth in said lease.

"Said grant, transfer and assignment of said Trustor's interest, *as Lessee,* in and to said lease is hereby made to said Trustee upon the express understanding and agreement between Trustor and Trustee that Trustee is not to be liable upon any of the covenants, obligations and requirements of said lease.

"It is expressly understood and agreed that all that certain oil refinery located upon Parcel II above described and all that certain bulk plant located upon Parcel I above described, including all machinery, equipment and fixtures and all tanks, vats, pumps, boilers, engines, meters, pipes, stills, and fractionating towers now situated upon the above described premises, or either of them, in whatever manner affixed or attached to either of said parcels of real property, are and shall be *deemed to be* real property and expressly included in the above grant, transfer and assignment." (Italics ours; Tr. pp. 29-30.)

It is undisputed that the trustor, the respondent oil company herein, did not own any interest in said parcel of real property except such interest as it had

as lessee. (Tr. p. 44.) In any event, the trustor did not, by said trust deed, purport to *transfer* any interest other than that which it had *as lessee.*

It is well established that a leasehold interest is merely personal property, and the rules relating to transfers of personal property apply to transfers of such leasehold interests. Thus in *J. S. Potts Drug Company* vs. *Benedict,* 156 Cal. 322, at 327, (1909), it was held that an *assignment* of a leasehold interest, being governed by the rules applicable to personal property, passed title immediately upon the agreement being made, no delivery of possession being necessary. Therefore, where the premises were destroyed by fire, before the assignee was placed in possession, said assignee was nevertheless liable for the price.

So, also, in *Summerville* vs. *Stockton Milling Co.,* 142 Cal. 529 at 537 (1904), it was held that a leasehold estate, being personal property, is not subject to the lien of a judgment as upon real property. Therefore, it was held that an antecedent judgment lien was not paramount to a later dated chattel mortgage of a crop growing upon the leased land there in question.

On principle then, there can be no question but that the parties to said trust deed were required to comply with the provisions of law relating to the mortgaging of *personal property* in order that their encumbrance of the leasehold interests of said respondent oil company might be valid as against

third persons. This they did not do, either by an actual transfer of possession, pursuant to section 3440 of the California Civil Code, or by executing and recording said instrument in compliance with the provisions of section 2957 of said Civil Code.

Said section 3440 specifically provides that:

> "Every transfer of personal property, other than a thing in action * * * and every lien thereon, other than a mortgage, when allowed by law * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the thing transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, * * * and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer * * *."

It is undisputed that there was no actual transfer of possession of any of the property described in said deed of trust. (Tr. pp. 46-47.)

Said section 2957, at all times herein mentioned, provided as follows:

> "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless:
>
> 1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith

and without any design to hinder, delay, or defraud creditors;

2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property."

Executing and recording a mortgage in compliance with the provisions of said section is a substitute for the transfer of possession as required by said section 3440. (See *Wolpert* vs. *Gripton,* 213 Cal. 474 (1931).) While said deed of trust herein was in fact recorded, it is undisputed that it was *not* accompanied by the affidavit of all or of any of the parties thereto that it was made in good faith and without any design to hinder, delay or defraud creditors. By the express terms of said section 2957, then, said deed of trust is void as against the lien claim of the State of California, as a tax creditor of the trustor, the El Camino Oil Company.

In support of this conclusion based upon principle, see *Farmers State Bank* vs. *Scheel,* 214 Pac. 825 (Wash. 1923). There it was squarely *held* that the *assignment of a lease to secure an indebtedness, is a chattel mortgage and is subject to the statute requiring an affidavit of good faith and recording thereof.* See, also, *In re Empire Refining Company,* 1 Fed. Supp. 548 (1932), where the district court below, per Judge James, held that a chattel mortgage did not comply with the provisions of said section 2957 relating to the affidavit of good

faith. The files in said case disclose that the property there purportedly mortgaged was a *gasoline refinery located upon leased property.* Thus the court was required to held that the property in question was *personal property,* in holding that the mortgage thereof was subject to the provisions of said section 2957. Similarly, in the principal case, it must be held that the attempted encumbrance of the leasehold interest of the El Camino Oil Company, including its right *under said lease* to said gasoline refinery, plant, and equipment, was void as against the State of California, because it did not comply with the provisions of said section.

In this regard it should further be noted that said deed of trust, as has already been mentioned, provided that:

> "It is expressly understood and agreed that all that certain oil refinery located upon Parcel II above described and all that certain bulk plant located upon Parcel I above described, including all machinery, equipment and fixtures and all tanks, vats, pumps, boilers, engines, meters, pipes, stills, and fractionating towers now situated upon the above described premises, or either of them, in whatever manner affixed or attached to either of said parcels of real property, are and *shall be deemed to be* real property and expressly included in the above grant, transfer and assignment." (Tr. pp. 29-30; italics added.)

By this provision the parties to said instrument have attempted to convert into real property that

which even they recognized was in fact merely personal property. While such an agreement may be binding as between the parties thereto, it is not apparent how it can in anywise affect the rights of third parties without either actual or constructive notice thereof. On the contrary, it indicates a recognition even by the parties to said instrument, that the property in question was not *in fact,* real property. Therefore, in order to be valid as against the State of California, it should have been executed in the manner required by law for mortgages of personal property.

It thus appears that the appellees F. R. Kenney and L. W. Wickes do not now, nor did they at any time, have any lien upon said property described in said deed of trust as Parcel II, which was valid as against the State of California as tax creditor of said oil company. (As to the property described as Parcel I in said deed of trust, the State of California relies, for priority, upon its lien being paramount to even valid antecedent contract liens. This point will be considered hereinbelow.

It is therefore submitted that the district court erred in holding that the deed of trust dated June 7, 1930, created and constitutes a valid and existing lien, *as against the State of California* upon the property described in said deed of trust as Parcel II. The order of the district court should be modified accordingly.

C. Point Three

The District Court erred in ordering that said claim of F. R. Kenney and said L. W. Wickes constitutes a lien upon the property described in said chattel mortgage and deed of trust, prior and paramount to the lien of the state of California upon said property for penalties added to license taxes due on account of motor vehicle fuel sold and delivered by the El Camino Oil Co., Ltd., from and including the first day of April, 1930, to and including the tenth day of June, 1930.

This point relates to the errors assigned as Numbers V and XI in the assignment of errors filed herein. (Tr. p. 99.) Said assignment Number V relates specifically to the priority of the lien of the chattel mortgage over the lien for said penalties, and assignment Number XI relates specifically to the priority of the deed of trust over the lien for said penalties. However, since the same legal principles are involved as to each of said contract liens in this regard, said assignments have been consolidated herein for treatment as a single point.

Briefly, the proposition here presented by appellant is that when, subsequent to August 15, 1930, penalties were added to taxes which became delinquent on that date but which had accrued and become a lien from day to day during the second quarter of the year 1930, such penalties attached as a lien, the same as did the taxes to which said penalties were added, as of the date of the delivery of the gasoline on account of which said taxes accrued.

Therefore, as to the penalties which were added to any taxes which accrued on or before June 10, 1930, said penalties were, like the taxes to which they were added, secured by a lien which attached *prior in point of time* to the recording of the chattel mortgage and deed of trust of the individual claimants herein. Therefore the lien for said penalties clearly was paramount to the subsequent contract liens, if any, of said individual creditors.

As has been noted the court below held that the principal of the taxes assessed on the basis of the gasoline sold and delivered by the El Camino Oil Company subsequent to the thirty-first day of March, 1930, but prior to and including the tenth day of June, 1930, was secured by a lien which was prior and paramount to the contract lien of said individual creditors recorded on said tenth day of June, 1930. In so holding, the district court merely followed the express provisions of section 4 of the California Motor Vehicle Fuel License Tax Act. (Calif. Stats. 1923, p. 572; as amended by Calif. Stats. 1925, p. 659.) In 1930 said section 4 provided as follows:

> "Sec. 4. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter.

> Said tax shall be a lien upon all of the property of the distributor. *It shall attach at the time of the delivery or distribution, subject to the tax,* shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock p.m. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency."

It is well settled that when a tax statute expressly designates the date as of which the tax lien shall attach, the lien comes into existence on that date regardless of the fact that certain further steps by the taxing authorities are necessary in order to fix the *amount* of the tax and render it *payable.*

> *County of San Diego* vs. *County of Riverside,* 125 Cal. 495, at 500 (1899);
> *City of Santa Monica* vs. *Los Angeles County,* 15 Cal. App. 710 (1911);
> 24 Cal. Jur. 218 to 219 ("Taxation," Sec. 208) (1936).

In other words, as the principle is summarized in 61 C. J. 924 to 925 ("Taxation," Sec. 1175):

> "While a statute which definitely fixes the date or time when the lien shall attach, does not do away with the necessity of the necessary steps to be taken before such lien can become

effectual, the lien dates back and takes effect by relation from the date or time fixed by the statute." (Citing the above cited California cases.)

In holding that the principal of the taxes assessed upon the basis of distributions by the El Camino Oil Company from April 1, 1930, to June 10, 1930, inclusive, became a lien upon said property as of the date of the distribution, notwithstanding the *amount* of said taxes was not fixed or assessed and did not become *payable* until subsequent to said tenth day of June, 1930, the court below was merely applying the foregoing principle.

Furthermore, the court below also held that the penalties which were added to the taxes assessed against said El Camino Oil Company pursuant to the provisions of the aforesaid section 4 of the tax statute were, as a part of the taxes to which they were added, a lien upon the property of said company. This ruling is squarely supported by the decision of this court in *State of California* vs. *Hisey,* 84 Fed. (2nd) 802, at 805 (9th C. C. A. 1936). For some reason, however, in determining the *time* as of which said lien for *penalties* attached, the court below chose to distinguish between the lien for the principal of the tax and the lien for said penalties. In other words, although the court had held, as above noted, that the lien for the *principal* of the tax assessed upon the basis of distributions during the period from

April 1, 1930, to June 10, 1930, attached as of the date of said distributions notwithstanding said taxes were not computed or assessed until thereafter, the court held that as to the *penalties* which were subsequently added to and became a part of said tax and were supported by the same lien which supported said tax, said lien securing the penalty did *not* attach as of the date of the distributions which were the basis for the assessments to which said penalties were added. It is submitted that in so ruling the district court erred. Clearly, the date specified in the foregoing section 4 as the date as of which the lien provided for by said section shall attach, relates to the *entire* lien created by said section. If, as this court has held, the penalties are a lien as a part of the tax to which they are added, it is difficult to perceive how it can reasonably be said that the lien for the principal of the taxes, on the one hand, attaches as of the date specified in the statute, while the lien for the penalties added to said taxes attaches as of some other date. Manifestly, the only sound construction of said section is that the entire lien created thereby attaches as of the date of the distributions which are subsequently made the basis for an assessment, which assessment may, in the event of delinquency, include an additional ten per cent thereon as a penalty. In other words, the *amount* of the tax lien will not be ascertained until it is determined whether said penalties must be added to said tax.

But, the amount having been thus fixed, the *lien* therefor necessarily, by the express terms of the statute, must be held to have attached as of the date of the distributions upon which said tax (including the penalty) was based. The order of the district court should be modified to so provide.

D. Point Four

Said district court erred in ordering that said claim of F. R. Kenney and said L. W. Wickes constitutes a lien upon the property described in said deed of trust and chattel mortgage prior and paramount to the lien of the State of California upon said property for licenses taxes due on account of motor vehicle fuel sold and delivered by said El Camino Oil Company, Ltd., subsequent to the tenth day of June, 1930, together with penalties thereon for delinquencies.

This point relates to the errors assigned as Numbers VI and XII in the assignments of error filed herein. (Tr. pp. 97-99.) Said assignment Number VI relates specifically to the priority of the lien of the chattel mortgage, over said tax lien, and assignment Number XII relates specifically to the priority of the lien of the deed of trust, over said tax lien. Since the same legal principles are involved as to each of said contract liens in this regard, said assignments have been combined into the foregoing single statement of the proposition presented herein.

Briefly stated, the proposition of the appellant presented under this point is that, even if it be

assumed that the claim of the foregoing contract creditors was secured by said chattel mortgage, and that said deed of trust is valid as against the State of California, and that the lien for penalties on taxes based on distributions from April 1, 1930, to June 10, 1930, attached subsequent to said tenth day of June, 1930, rather than as of the date of said distributions, still, in any event, the lien securing the claim of the State of California *in its entirety,* was nevertheless prior and paramount to any lien of said contract creditors. In other words, it is submitted that even the portion of the state's lien which attached subsequent, in point of time, to the recording of the lien of the contract creditors, is prior and paramount to any valid antecedent contract lien upon the property of the tax debtor.

It has never been disputed by the appellee that the legislature has the *power* to make a tax lien paramount to an antecedent contract lien. And, as is stated in *Guinn* vs. *McReynolds,* 177 Cal. 230, at 232 (1918).

> *"The priority need not be declared in express terms. It is enough if the intent to postpone contract liens appear by reasonable inference from the provisions of the act."* (Italics added.)

Therefore, the only question for determination herein, is whether the Legislature of the State of California has *exercised* this power in so far as the tax lien here in question is concerned.

In section 4 of the California Motor Vehicle Fuel License Tax Act, quoted hereinabove, it is specifically provided that said lien "shall have the effect of an execution duly levied against all property of the distributor, *and shall remain until the tax is paid or the property sold for the payment thereof.*" (Emphasis ours.) It is submitted that by this provision the legislature has clearly evidenced its intention to make the tax lien superior to *all* contract liens. No other possible construction can be given to said language and give any reasonable effect thereto. Thus, it does not appear how it would be possible for the tax lien to "remain until the tax is paid" if such lien is subject to an antecedent contract lien which might, of course, foreclose out any inferior lien. Nor is it disclosed how it would be possible to sell said property *for the payment of the taxes* if the tax lien is inferior to an antecedent contract lien, which tax lien might thus be wiped out before the property is ever sold for the taxes. For instance, if the property involved herein had already been sold under a proceeding to enforce the contract lien which the contract creditors claim is paramount, and the tax had not been paid nor the property sold for the payment thereof, then clearly, by the express terms of the statute, *the tax lien would remain notwithstanding such sale.* Yet it could *not* remain unless it were paramount to the earlier dated contract lien. On principle, then, the conclusion is inevitable that the legislature, by the provisions of said section 4, intended to and did

provide that the lien for motor vehicle fuel taxes should be paramount to earlier dated contract liens upon the property of the taxpayer.

In fact, this very construction has been placed upon these same words when used in relation to the *personal property* tax lien in California.

> *California Loan & Trust Co.* vs. *Weis,* 118 Cal. 489 (1897).

Section 3716 of the California Political Code, which was before the court in the cited case, then read as follows:

> "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof."

In 1930, section 4 of the California Motor Vehicle Fuel License Tax Act, provided in part as follows:

> " * * * Said tax shall be a lien upon all of the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof * * * "

In the cited case the California Supreme Court held that said section 3716 of the Political Code

clearly indicated the legislative intention to make the tax lien paramount to even *antecedent* contract liens upon *real property* of the party owing *personal property taxes.*

The appellees will undoubtedly follow the course pursued by them in the court below, of claiming that any language favorable to the appellant which may be found in this decision is but dicta, relying upon the court's further reference to section 3788 of the California Political Code. In view of the importance of the cited case upon the question here involved, the court will undoubtedly want to read said case in its entirety. The appellant will not, therefore, burden the court with lengthy quotations therefrom. Suffice it to say that, in such reading the court will unquestionably be impressed with the fact that the California court was *not* merely expressing certain dicta, but was carefully considering all the statutory provisions pertinent to the question before them. They based their decision upon *both* statutory provisions (Pol. Code, secs. 3716 and 3788), and the mere fact that they stated that their construction of Political Code section 3716 was "*aided* so as to remove the need of interpretation by section 3788" does not mean that their decision was not based, at least in the first instance, upon their full consideration of the first of these sections.

In any event, whether the language in said case be decision or dicta, the fact remains that that is

the *only* construction which has been placed upon such language in California. It is wholly unreasonable, then, to assume that the California Legislature, in using this same language in section 4 of the California Motor Vehicle Fuel Tax Act, intended that it should be interpreted as might have been done by the courts of other states. Clearly, they must have intended to use said language in the only sense in which it has ever been construed by the California courts, whether such construction be by decision or dicta. Therefore, appellant will not encumber this brief with an analysis of the conflicting decisions upon this question, in *other* states. It is the law of *this* state with which we are here concerned. It is very apparent that the Legislature deliberately adopted, in the Motor Vehicle Fuel License Tax Act, the identical language which the California Supreme Court had held made the *personal property* tax lien paramount to antecedent contract liens upon the real property of the tax debtor. Their intention to make this license tax lien of the same effect as said personal property tax lien could not have been more clearly indicated.

Finally, this honorable court, as recently as January 18, 1937, in the case of *Berryessa Cattle Company* vs. *Sunset Pacific Oil Company (Sunset Oil Company, appellants,* vs. *The State of California, and Ray L. Riley, Controller of the State of California, appellees),* being No. 8182 before this

court, has squarely held that the lien of taxes such as those here in question is paramount to antecedent contract liens. This particular point was not discussed in the *opinion* of the court in that case, but the point was squarely raised, and argued to the court, and, in affirming the decision of the court below, this court necessarily was required to hold that the state's tax lien was paramount to the lien of the contract creditor (the appellant in said case) under an earlier dated deed of trust.

The decision herein, of the court below, should therefore be modified so as to order that the lien of the State of California, is, in any event, paramount to any antecedent contract lien which the individual claimants herein may have.

E. Conclusion

In conclusion, it is submitted that the order of the district court must be modified in each of the foregoing particulars. The chattel mortgage of June 6, 1930, was fully satisfied by the credit to which the El Camino Oil Company became entitled when the accounting was had between said company and the individual claimants, appellees herein. Therefore, no portion of the claim of said creditors should have been held secured by the lien of said chattel mortgage. The district court erred in ordering that the claim of said individual creditors was secured by the lien of said chattel mortgage.

The trust deed of June 7, 1930, was, as to the property described as Parcel II, merely an attempted mortgage of personal property, viz, of a certain leasehold interest of the El Camino Oil Company. It was not, however, executed in the manner required by law for mortgages of personal property. Said instrument was therefore invalid as against the State of California as tax creditor of said oil company. The district court erred in ordering that the claim of said individual creditors was secured by the lien of said deed of trust as a valid lien, as against the State of California, upon said property described therein as Parcel II.

The penalties which were added to the taxes assessed upon the basis of distributions of motor vehicle fuel by the El Camino Oil Company from April 1, 1930, to June 10, 1930, inclusive, were a lien upon the property of said company. The district court properly so held, but failed to order that said lien attached as of the dates of such distributions (the same as did the lien for the taxes to which said penalties were added), and consequently *prior in time* to the recording of the chattel mortgage and deed of trust relied upon by the individual claimants. The district court erred in failing to specify in its order the date as of which said lien for said penalties attached, and in failing to order that the lien of said penalties was prior and paramount to any lien of said chattel mortgage and trust deed.

Finally, and without regard to the determination made by the court upon the foregoing propositions, the tax lien of the State of California for even that portion of its claim which accrued subsequent in point of time to the recording of said chattel mortgage and deed of trust, is paramount to even valid liens which may have been created by said contractual encumbrances. In other words, even if the chattel mortgage was *not satisfied* by said accounting whereby the mortgagor became entitled to a credit in excess of the amount of said mortgage, but is an existing and valid lien, and even if said deed of trust was *not invalid* as against the State of California as to the personal property described therein as Parcel II, and even if the lien for the penalties upon the taxes based upon distributions of motor vehicle fuel from April 1, 1930, to June 10, 1930, inclusive, did *not attach* as of the dates of said distributions (the same as did the lien for the tax which was assessed upon the basis of said distributions), still, the *entire* tax lien of the State of California, is superior and paramount to even such *valid* contract liens, even though a portion of said tax lien is *subsequent in point of time* to said contract liens. The legislature of the State of California clearly expressed its intention that the lien for the taxes in question should be paramount to antecedent contract liens. There is no question as to the *power* of the legislature to so provide. It *exercised* this power by adopting language which

the California Supreme Court had previously held disclosed the intention to make the tax lien paramount to antecedent contract liens. The district court erred in ordering that that portion of the state's lien which attached *subsequent* to June 10, 1930, was inferior to any lien which the individual creditors may have acquired as against the state by recording said chattel mortgage and deed of trust on that date.

The order of the district court should be modified accordingly. It should be ordered that no portion of the claim of said individual creditors is secured by said chattel mortgage; and that, in any event, any such lien is inferior to the *entire* tax lien of the State of California. It should further be ordered that no portion of the claim of said individual creditors is, as against the State of California, secured by said deed of trust as upon the property described therein as Parcel II; and that, in any event, any such lien is inferior to the *entire* tax lien of the State of California. It should be further ordered that the lien for the penalty which was added to the taxes which were based upon distributions of motor vehicle fuel from April 1, 1930, to June 10, 1930, attached as of the dates of such distributions, and so were *prior in point of time,* and so superior to any lien of the contract creditors; and that, in any event the *entire* tax lien of the State of California is *paramount* to *any* lien of the contract creditors, even if such contract lien be earlier, in point of

time, than the tax lien of the state. Finally, and principally, it should be ordered that the tax lien of the state is paramount to even antecedent contract liens.

Respectfully submitted.

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By JOHN O. PALSTINE,
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O

No. 8409.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

J. N. Hendrickson,
Complainant,
vs.
El Camino Oil Company, Ltd., a Corporation,
Respondent.

State of California,
Creditor and Appellant,
vs.
H. A. Meek, as Receiver of El Camino Oil Company, Ltd., a Corporation,
Receiver and Appellee,
F. R. Kenney and L. W. Wickes,
Creditors and Appellees.

BRIEF OF APPELLEES KENNEY AND WICKES.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Creditors and Appellees.

BRIEF OF APPELLEES KENNEY AND WICKES.

STATEMENT OF THE CASE.

Appellees F. R. Kenney and L. W. Wickes feel that appellant has made a fair and proper statement of the case both as to facts (Appellant's Opening Brief, pp. 4-8) and as to the questions involved (Appellant's Opening Brief, pp. 8-14) and therefore will make no additional statement.

Outline of Argument.

I. The claim of F. R. Kenney and L. W. Wickes is secured by a chattel mortgage dated the sixth day of June, 1930, executed by El Camino Oil Company, Ltd., respondent herein, and recorded in the office of the County Recorder of Los Angeles County the tenth day of June, 1930.

Argument based on principle.

II. The deed of trust executed June 7, 1930, by El Camino Oil Company, Ltd., created and constitutes a valid and existing lien, as against the State of California, upon the property described in said deed of trust as Parcel II.

California Civil Code, Sections 657, 2220, 2924 and 2957;

Insurance Co. v. Haven, 95 U. S. 251;

Hawkins v. Trust Co., 79 Fed. 50;

Weber v. McCleverty, 149 Cal. 316; 86 Pac. 706;

Thomas v. Lamb, 50 Cal. App. 483; 195 Pac. 441;

Sacramento Bank v. Murphy, 158 Cal. 390, 394; 115 Pac. 232;

Norton v. Norton, 50 Cal. App. 483; 195 Pac. 441.

III. The claim of F. R. Kenney and L. W. Wickes constitutes a lien upon the property described in said chattel mortgage and deed of trust, prior and paramount to the lien of the State of California upon said property

for penalties added to license taxes due on account of motor vehicle fuel sold and delivered by El Camino Oil Company, Ltd., from and including the first day of April, 1930, to and including the tenth day of June, 1930.

W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191 Pac. 1027.

IV. The claim of F. R. Kenney and L. W. Wickes constitutes a lien upon the property described in said deed of trust and chattel mortgage prior and paramount to the lien of the State of California upon said property for license taxes due on account of motor vehicle fuel sold and delivered by El Camino Oil Company, Ltd., subsequent to the tenth day of June, 1930, together with penalties thereon for delinquencies.

California Motor Vehicle Fuel License Tax Act, Section 4 (Calif. Stats. 1923, p. 572, as amended by Calif. Stats. 1925, p. 659);

California Political Code (1897), Sections 3716 and 3788;

California Code of Civil Procedure, Sections 681 and 685;

Blood v. Light, 38 Cal. 649; 99 Am. Dec. 441;

Lean v. Givens, 146 Cal. 739; 81 Pac. 128;

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Faias v. Superior Court, 133 Cal. App. 525; 24 Pac. (2d) 567;

Palace Hotel Co. v. Crist, 6 Cal. App. (2d) 690; 45 Pac. (2d) 415;

St. Clair v. Jones, 58 Ind. App. 280; 108 N. E. 256;

Central Trust Co. of New York v. Third Ave. R. R. Co. (C. C. A. 2d), 186 Fed. 291;

Guinn v. McReynolds, 177 Cal. 230; 170 Pac. 421;

California Loan and Trust Co. v. Weiss, 118 Cal. 489; 50 Pac. 697;

Scottish American Mortgage Co. v. Minidoka County, 47 Idaho 33; 272 Pac. 498;

Carstens & Earles v. City of Seattle, 84 Wash. 88; 146 Pac. 381;

Miller v. Anderson, 1 S. D. 539; 47 N. W. 957;

Pauley v. State of California (C. C. A. 9th), 75 Fed. (2d) 120;

Smith v. Skow, 97 Iowa 640; 66 N. W. 893;

Advance Thresher Co. v. Beck, 21 N. D. 55; 128 N. W. 315;

Cooley, The Law of Taxation, paragraph 1240.

ARGUMENT.

I.

The Claim of F. R. Kenney and L. W. Wickes Is Secured by a Chattel Mortgage Dated the Sixth Day of June, 1930, Executed by El Camino Oil Company, Ltd., Respondent Herein, and Recorded in the Office of the County Recorder of Los Angeles County the Tenth Day of June, 1930.

Point One of the appellant's opening brief, pages 15-41, is a contention that the chattel mortgage securing payment of the $10,000.00 note executed and delivered by respondent to appellees Kenney and Wickes has been released.

In outline form appellant's argument is:

Since:

I. $10,000 note and chattel mortgage were executed and delivered prior to the $80,000.00 note and trust deed; and

II. Both notes were executed and delivered to evidence an undetermined indebtedness; and

III. The indebtedness was determined thereafter to be $78,046.60;

Therefore:

I. Respondent was entitled to a "credit" of $11,953.40; and

II. The $10,000.00 note, being first in time was discharged; and

III. The chattel mortgage was released.

The fallacy in appellant's argument lies in the assumption that respondent was entitled to a "credit" of $11,953.40. To make this assumption appellant needed to assume an indebtedness of $90,000.00 to which this "credit" might be applied.

The indebtedness was determined to be $78,046.60 and no more. Respondent still owes that principal amount and at no time was it entitled to a credit of any kind.

The only effect of respondent's executing two notes was to give Kenney and Wickes two causes of action against respondent with the added condition that judgment could be limited to $78,046.60. Kenney and Wickes, except for the present receivership matter, could file action on both notes or either note and respondent would have no defense until the indebtedness of $78,046.60, with interest, was discharged.

If appellant's theory were correct, and assuming that instead of taking two notes Kenney and Wickes had taken one note for $90,000.00 secured by the same property actually covered by both the chattel mortgages and the deed of trust, then, according to appellant, the respondent would be entitled to a "credit" of $11,953.40 and *the discharge of the security lien in a proportionate amount*. This is an untenable view since the lien remains as security until the debt is fully paid.

Both the chattel mortgage and the deed of trust create liens to secure payment of the indebtedness of respondent and are not discharged until payment in full is made.

The District Court committed no error in holding the $10,000.00 note and the chattel mortgage valid existing instruments constituting a lien to secure payment to Kenney and Wickes of the $78,046.60 debt.

II.

The Deed of Trust Executed June 7, 1930, by El Camino Oil Company, Created and Constitutes a Valid and Existing Lien, as Against the State of California, Upon the Property Described in Said Deed of Trust as Parcel II.

Appellant's argument (B. Point Two, pp. 18-25, Appellant's Opening Brief) briefly summarized is that the conveyance of a leasehold interest to a trustee to secure payment of a note is in legal effect a chattel mortgage and the failure to comply with section 2957, Civil Code of California, requiring an affidavit of good faith to be endorsed on a chattel mortgage by the parties thereto, makes the same void as to a subsequent encumbrance of the property in good faith.

The flaws in appellant's argument lie in its assumptions first, that a leasehold is personal property, and second, that a conveyance in trust to secure payment of an obligation is a chattel mortgage.

The short and complete answer to this argument of appellant is found in the definitions of property and of mortgages in the Civil Code of California.

Section 657, Civil Code of California, provides:

> "Property is either: 1. Real or immovable; or, 2. Personal or movable."

The Legislature in adopting this definition expressed the intent that in so far as the State of California is concerned real and immovable property are one and the same thing and that the terms "real" and "immovable" are interchangeable at will.

That a leasehold, *i. e.,* a term for years, is a chattel real and immovable (and therefore real property by definition in California), is well settled.

Insurance Co. v. Haven, 95 U. S. 251;

Hawkins v. Trust Co., 79 Fed. 50.

Appellees Kenney and Wickes admit that the California courts have in several instances dealt with leasehold estates as though the same were personal property, which at common law they were. These appellees feel however that the expressed intent of the Legislature is clear, unambiguous, and should rule.

Section 2924 of the Civil Code of California provides in part:

> "Every transfer of an interest in property, *other than in trust,* made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge * * *." (Italics appellees'.)

The above language is now and has been for at least twenty years past a part of said section though the section as a whole has been amended several times.

By this express exclusion of transfers in trust from the definition of mortgages it follows that a conveyance in trust is not a mortgage, and that the rules applicable to the valid execution of mortgages, chattel or otherwise, have no application to deeds of trust. Therefore the fact

that the deed of trust executed and delivered to appellees Kenney and Wickes to secure payment of respondent's $80,000.00 note did not contain the affidavit of good faith required in valid chattel mortgages does not invalidate said deed of trust with respect to Parcel II therein described. [Tr. p. 29.]

The California courts recognize the legal distinction between deeds of trust and mortgages, and hold that even though the practical effect of a deed of trust is similar to that of a mortgage containing a power of sale, nevertheless a deed of trust is not a mortgage and it is legally impossible to hold that the trustee has a lien on the property conveyed in trust or to hold that the property is subject to a lien.

Weber v. McCleverty, 149 Cal. 316; 86 Pac. 706;

Sacramento Bank v. Murphy, 158 Cal. 390, 394; 115 Pac. 232.

Trusts in personalty are valid in California.

Thomas v. Lamb, 11 Cal. App. 717; 106 Pac. 254;

Norton v. Norton, 50 Cal. App. 483; 195 Pac. 441;

Civil Code of California, Section 2220.

The District Court committed no error in ruling that the deed of trust executed by respondent to secure its note for $80,000.00 was and is a valid instrument which created with respect to parcels both I and II upon recordation a lien valid as against the State of California.

III.

The Claim of F. R. Kenney and L. W. Wickes Constitutes a Lien Upon the Property Described in Said Chattel Mortgage and Deed of Trust, Prior and Paramount to the Lien of the State of California Upon Said Property for Penalties Added to License Taxes Due on Account of Motor Vehicle Fuel Sold and Delivered by El Camino Oil Co., Ltd., From and Including the First Day of April, 1930, to and Including the Tenth Day of June, 1930.

Appellant's argument in brief is that the lien of a penalty for failure to pay taxes become a lien as of the date at which the taxes became a lien and not at the date upon which the penalty for non-payment accrued.

Three periods to be considered in this portion of the argument are:

1. April 1 to June 10, 1930, the period during which taxes accrued and became a lien upon the property of respondent.
2. June 10, 1930, the date upon which the chattel mortgage and deed of trust, executed by respondent to secure to Kenney and Wickes payment of the notes for $10,000.00 and $80,000.00, were recorded.
3. August 15, 1930, the date upon which a ten per cent (10%) penalty was added to the taxes for non-payment thereof by respondent.

Appellant contends that since the penalty, when and if it arises, becomes part of the tax, it necessarily follows that the lien for the penalty must date back to the time of the accrual of the tax. This statement is not well taken in law or logic. It is not logical for the reason that

there are open alternatives and the arbitrary choice of the alternative favorable to the appellant is wish-thinking, not reason. It is just as logical, and more natural, to maintain that the lien for the penalty attaches at the time the penalty comes into existence, as to maintain the lien dates back.

Appellees Kenney and Wickes have found no authority directly on the point but respectfully call the court's attention to the rules governing mortgages securing future advances which offer a fair and proper analogy.

The rule, of course, is that the future advances, when made, have priority over liens arising between the time of making the mortgage and the time of making the advance, *if said advance was obligatory upon the mortgagee by the terms of the mortgage.* The intervening lien has priority over the lien for the future advance when the advance is voluntary and cannot be forced even though it may have been contemplated by the terms of the mortgage.

W. P. Fuller & Co. v. McClure, 48 Cal. App. 185; 191 Pac. 1027.

In the present instance when the tax accrued there was no obligation to pay a penalty and also the same situation existed when the chattel mortgage and trust deed were recorded. If there had been a foreclosure by Kenney and Wickes after the recording of the chattel mortgage and trust deed and before accrual of the penalty the State of California most certainly could not look to Kenney and Wickes for payment of the penalty and yet that is in effect the result of the present contention of appellant.

It appears that logically, by analogy and on the ground of just and equitable determination of priorities, that the lien for the penalty should be held to have attached on August 15, 1930, and not at any time prior thereto.

The ruling of the District Court so holding is well reasoned and proper.

IV.

The Claim of F. R. Kenney and L. W. Wickes Constitutes a Lien Upon the Property Described in Said Deed of Trust and Chattel Mortgage Prior and Paramount to the Lien of the State of California Upon Said Property for License Taxes Due on Account of Motor Vehicle Fuel Sold and Delivered by Said El Camino Oil Company, Ltd., Subsequent to the Tenth Day of June, 1930, Together With Penalties Thereon for Delinquencies.

The problem placed before the court by Point Four of appellant's argument, pages 31-37 of appellant's opening brief, is one of interpretation of the California Motor Vehicle Fuel License Tax Act, section 4, as it existed in 1930.

Said statute then provided in section 4, in part, that said tax—

> "shall have the effect of an execution duly levied against all the property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof * * *."

It is proper to ask, first, what is the effect of an execution duly levied against all the property of the distributor. *Blood v. Light,* 38 Cal. 649; 99 Am. Dec. 441, holds that the only effect of a levy of execution is to fix the date of the sheriff's title as against persons not parties to the writ.

Lean v. Givens, 146 Cal. 739; 81 Pac. 128, holds that an execution when levied makes a lien or charge against the property levied on.

The following cases hold that the levy of an execution subjects the property of the debtor to sale to satisfy the judgment against the debtor but that the execution sale does not affect prior liens and that the purchaser of an execution sale takes subject to prior liens.

San Francisco Breweries v. Schurtz, 104 Cal. 420; 38 Pac. 92;

Martin v. Heldebrand, 190 Cal. 369; 212 Pac. 618.

Particularly applicable to the present question are the following cases which hold that the only property a debtor has as trustor under a deed of trust is an equitable right to a reconveyance upon payment of his indebtedness and the right to receive any surplus upon a sale by the trustee and that *only such equitable rights are reached by an execution.*

King v. Gotz, 70 Cal. 236; 11 Pac. 656;

Heath v. Wilson, 139 Cal. 362; 73 Pac. 182;

Brown v. Campbell, 100 Cal. 635; 35 Pac. 433.

This reasoning by the California courts is consistent with the theory mentioned in Point II of argument above to the effect that a trust deed conveys legal title and does not create an encumbrance or lien.

Weber v. McCleverty, supra;

Sacramento Bank v. Murphy, supra.

There is no doubt but that the Legislature in adopting the language it did in said section 4 of the Motor Vehicle Fuel License Tax Act did so knowing that an execution lien does not affect liens prior in time to the levy. In expressly adopting such language it seems clear that it

expressly intended the tax lien should not take priority over valid liens prior in time.

Next it is proper to ask why the Legislature added the words—"and shall remain until the tax is paid or the property sold for the payment thereof * * *."

Appellees Kenney and Wickes feel that it is clear such language was added in order to remove a possible bar to enforcement of the tax lien after a period of five years. Since the Legislature saw fit to make the tax lien equivalent to the lien of an execution it also saw fit to keep that equality until the tax was paid or the property sold by expressly removing any thought that the tax lien might become outlawed.

The possible limitation arises from the provisions of sections 681 and 685 of the Code of Civil Procedure of the State of California. Said sections make it necessary to apply for a writ of execution within five years after entry of judgment and any application made thereafter is not granted as a matter of right but only in the sound discretion of the court. See the following cases:

Faias v. Superior Court, 133 Cal. App. 525; 24 Pac. (2d) 567;

Palace Hotel Co. v. Crist, 6 Cal. App. (2d) 690; 45 Pac. (2d) 415.

The contention of these appellees that the act in question merely provides for a lien not subjected to a limitation in time and does not attempt to give that lien priority over existing encumbrances is borne out by the following authorities as well as by the reasonable interpretation of the exact language used in the act.

St. Clair v. Jones, 58 Ind. App. 280; 108 N. E. 256, holds that a statute which provided that the lien of the state for all taxes should attach on all real estate and should be perpetual for all taxes due from the owner thereof until paid gave no priority to the tax lien.

Central Trust Co. of New York v. Third Ave. R. R. Co. (C. C. A. 2d), 186 Fed. 291, holds that the language of a statute making a franchise tax a lien upon a corporation's real and personal property "from the time when it is payable until the same is paid in full," did not make the tax lien prior to an existing mortgage.

Guinn v. McReynolds, 177 Cal. 230; 170 Pac. 421, holds that a lien created to secure repayment of money expended by the county horticultural commissioner in eradication of insects was not prior to an antecedent mortgage. The court said:

> "But the authorities declare, virtually without dissent, that even a tax lien is not entitled to rank ahead of a pre-existing mortgage, or other contract lien, unless the legislative enactment creating the tax has given it priority."

Appellant contends that *California Loan and Trust Co. v. Weiss,* 118 Cal. 489, 50 Pac. 697, is ample authority for holding that the Motor Vehicle Fuel License Tax Act, as it provided in 1930, gives the state a lien for unpaid taxes prior to pre-existing contract liens.

That case involved the question of priority between the title acquired by a purchaser at a tax sale and the lien of a mortgage which attached to the land prior in time to the lien of the taxes, which said taxes, under section 3716 of the Political Code (1897), were made a lien upon real

property and were not removed "until the taxes were paid or the property sold for the payment thereof." The court discussed the effect of this language and made certain comments with respect thereto, but did not make the construction of that section the basis for its decision, and held that the need of construction was removed by reason of the provisions of section 3788 of the Political Code, saying at page 495:

> "* * * but that language is aided so as to remove the need of interpretation by section 3788, which provides that the deed conveys the absolute title free from all encumbrances."

The court then went on, basing its decision upon the provisions of section 3788, which provides that a deed to a grantee conveys absolute title, free and clear of all encumbrances. The language of the decision, therefore, with respect to the provisions of section 3716, providing that a tax shall remain a lien until paid, is mere dicta, and it is submitted that, in the light of the great weight of authority to the contrary, further weight should not be given to this unguarded dicta.

No provision existed in 1930 in the law of California which could enlarge the language of the Motor Vehicle Fuel License Tax Act as section 3788, Political Code of California (1897), enlarged the language of section 3716, Political Code of California (1897).

At the very least there is uncertainty and ambiguity with respect to the legislative intent as expressed in section 4 of the Motor Vehicle Fuel License Tax Act as it read

in 1930. It is a settled rule of law that tax statutes should be strictly construed against the state.

Guinn v. McReynolds, supra;
Cooley, The Law of Taxation, paragraph 1240.

The appellant state by its contention would have the court impose the burden of a mere license tax upon not only the property of the obligor El Camino Oil Company, Ltd., respondent herein, but upon the appellees Kenney and Wickes who acquired the legal title to the property prior to the accrual of taxes after June 10, 1930. In effect the action of the appellant state is an attempt to change the obligor of the license or privilege tax from respondent herein to appellees Kenney and Wickes. The injustice of such a contention is so clear that courts in similar situations have repeatedly refused to extend the lien for taxes imposed upon one property to priority over pre-existing liens upon other property.

Scottish American Mortgage Co. v. Minidoka County, 47 Idaho 33; 272 Pac. 498;
Carstens & Earles v. City of Seattle, 84 Wash. 88; 146 Pac. 381;
Miller v. Anderson, 1 S. D. 539; 47 N. W. 957.

The tax imposed by the Motor Vehicle Fuel Tax Act is a license, excise, privilege or occupation tax upon the business of selling motor vehicle fuel.

Panley v. State of California (C. C. A. 9th), 75 Fed. (2d) 120.

The doctrine that taxes are superior to pre-existing contract liens should be limited to general taxes and not extended to liens for license and excise taxes.

Smith v. Skow, 97 Iowa 640; 66 N. W. 893.

The constitutional power of the state to grant priority over antecedent liens of a tax imposed upon property other than that upon which the tax is levied is so doubtful that a construction granting such priority should be avoided.

Scottish American Mortgage Co. v. Minidoka County, supra;

Advance Thresher Co. v. Beck, 21 N. D. 55; 128 N. W. 315.

The District Court very properly ruled that the claim of appellees Kenney and Wickes based upon said chattel mortgage and deed of trust is prior and paramount to the claim of the State of California based upon its lien for taxes accruing subsequent to June 10, 1930.

Conclusion.

Appellees Kenney and Wickes respectfully submit that the authorities cited in this brief as well as general principles of law and equity indicate that the court below properly made its order sustaining the validity of the chattel mortgage and deed of trust securing the claim of Kenney and Wickes against respondent and that their claim is prior and paramount to the claim and lien of the State of California for all taxes and penalties accruing after June 10, 1930, because of motor vehicle fuel sold by respondent El Camino Oil Company, Ltd., and that these authorities and principles should induce this Honorable Court to affirm the order of the court below and deny the appeal herein.

Respectfully submitted,

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Attorney for Appellees F. R. Kenney and L. W. Wickes.

No. 8409.

In the United States Circuit Court of Appeals

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12

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Creditors and Appellees.

BRIEF OF APPELLEE H. A. MEEK, AS RECEIVER OF EL CAMINO OIL COMPANY, LTD., A CORPORATION.

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No. 8409.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

J. N. Hendrickson,
Complainant,

vs.

El Camino Oil Company, Ltd., a Corporation,
Respondent.

State of California,
Creditor and Appellant,

vs.

H. A. Meek, as Receiver of El Camino Oil Company, Ltd., a Corporation,
Receiver and Appellee,

F. R. Kenney and L. W. Wickes,
Creditors and Appellees.

BRIEF OF APPELLEE, H. A. MEEK.

I.

STATEMENT OF THE CASE.

A. The Facts.

Appellee, H. A. Meek, is satisfied with appellant's statement of the case as to facts (App. Op. Br. pp. 4-8) with the exception following.

In appellant's statement of the case as to facts the statement is made to the effect that on June 6, 1930, the promissory note in the sum of $10,000.00 together with the mortgage securing the same was executed and delivered to appellees, F. R. Kenney and L. W. Wickes, and that on June 7, 1930, the promissory note in the sum of $80,000.00, together with deed of trust securing same, was executed and delivered to appellees, F. R. Kenney and L. W. Wickes (App. Op. Br. p. 5).

The stipulated statement of facts was as follows:

> ". . . that on or about June 7, 1930, said El Camino Oil Company, Ltd. made, executed and delivered two promissory notes in the amounts of Eighty Thousand ($80,000.00) Dollars and Ten Thousand ($10,000.00) Dollars, respectively, payable to F. R. Kenney and L. W. Wickes on demand and bearing interest at Seven (7%) Per Cent per annum compounded quarterly. That copies of said notes together with the instruments securing the same are attached hereto and made a part hereof." [Tr. p. 18.]

The copy of the trust deed [Tr. pp. 28-41] does not contain a copy of the $80,000.00 note, and apparently due to a mistaken impression that the said trust deed did contain a copy of said note a copy of the same is not set forth at any place in the transcript. However, a copy of the $80,000.00 note showing the same to bear the date of June 6, 1930 (the same date borne by the $10,000.00 note), is part of the claim filed by F. R. Kenney and L. W. Wickes, and the said $80,000.00 note is in fact dated June 6, 1930, and was executed at the same time as the chattel mortgage note in the sum of $10,000.00. While a copy of the $80,000.00 note does not appear in the tran-

script, neither does it appear by stipulation in the transcript that the $10,000.00 note bears an earlier date than the $80,000.00 note, nor that the $10,000.00 note was executed on a date prior to the $80,000.00 note, nor that the notes had different dates of maturity [Tr. pp. 18-19], all of which is assumed by the appellant to be disclosed by the transcript.

B. The Questions Involved on This Appeal.

The appellee, H. A. Meek, is satisfied with appellant's statement of questions involved on this appeal.

II.

ARGUMENT.

A. Answering Appellant's Point One.

The Chattel Mortgage Executed by the El Camino Oil Company, Ltd. and Recorded June 10, 1930, in the Office of the County Recorder of Los Angeles County, Created a Valid and Existing Lien Securing the Claim of F. R. Kenney and L. W. Wickes.

Appellant's Point One (App. Op. Br. pp. 15-41) is to the effect that the chattel mortgage securing a note in the sum of $10,000.00 had been satisfied by an alleged credit, and therefore, the said mortgage is not an existing lien in favor of claimants and appellees, F. R. Kenney and L. W. Wickes. The alleged "credit" was the determination of the exact amount due F. R. Kenney and L. W. Wickes from the El Camino Oil Company, Ltd. in connection with certain "realization" contracts for the purchase of crude oil. [Tr. pp. 18-19.] Appellant cites and relies upon section 1479 of the California Civil Code.

The argument of the appellant assumes certain facts to be true that are not true and are not established by the evidence (Stipulated Statement of Facts), and the conclusions drawn by the appellant are erroneous in the following particulars:

1. Appellant assumes that the chattel mortgage and $10,000.00 note was executed and delivered June 6, 1930, and that the $80,000.00 note was executed and delivered June 7, 1930. As heretofore pointed out in this brief under "Statement of the Facts," both notes were dated June 6, 1930. Also the stipulated facts do not bear out appellant's assumption, the stipulation being that both notes were executed on or about the 7th day of June, 1930, and as part of the same transaction. At most the transcript does not disclose the exact date and terms of the $80,000.00 note, and it is contended that the Court cannot presume that the same was dated, executed or delivered subsequent to the $10,000.00 note.

2. Appellant contends that the $10,000.00 note and the $80,000.00 note were different or several obligations within the meaning of section 1479 of the California Civil Code, which provides:

> "Application of payments upon several obligations. —Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:
>
> One. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

Two. If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of (the) debtor.

Three. If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order; and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably.

1. Of interest due at the time of the performance.
2. Of principal due at that time.
3. Of the obligation earliest in date of maturity.
4. Of an obligation not secured by a lien or collateral undertaking.
5. Of an obligation secured by a lien or collateral undertaking."

It is submitted that both notes and the instruments securing them were in fact one obligation given to secure a single indebtedness [Tr. pp. 18-19], the amount of which was undetermined at the time of the execution of the instruments, and such instruments cannot be held to be "several obligations" within the meaning of section 1479 of the Civil Code.

3. Appellant contends that the determination of the amount due was a credit on the obligation. A credit from F. R. Kenney and L. W. Wickes to the El Camino Oil Company, Ltd. assumes that the said F. R. Kenney and L. W. Wickes were indebted to the El Camino Oil Company, which was not a fact.

4. Appellant further assumes that the determination of the amount due was "an act by way of performance" on the part of the debtor as set forth in section 1479 of the Civil Code. It is submitted that an "act by way of performance" within the meaning of section 1479 is the rendition of services or the payment of money, and that the fact of determining the amount due was not an "act by way of performance."

5. Appellant further assumes that at the time of the alleged performance the intention or desire of the debtor was not carried out as provided in subdivision 1 of Civil Code section 1479. In that connection it is submitted that the intention of the parties, to the notes and instruments securing them, was that the properties described in both the trust deed and chattel mortgage should be pledged to secure the amount later determined to be due. Consequently, it was clearly the intention and desire of the debtor that the $10,000.00 note and mortgage securing the same should not be cancelled or satisfied upon the determination that the amount of the indebtedness was less than $80,000.00. This is further borne out by the fact that the note was not, in fact, cancelled.

6. Appellant further assumes that the creditors, F. R. Kenney and L. W. Wickes, did not make application of the alleged "performance" in accordance with subdivision 2 of Civil Code section 1479. It is submitted that

there is no fact that can be drawn from the stipulated statement of facts to support such conclusion.

7. Appellant further assumes that the notes were more than one obligation and further were obligations of different classes inasmuch as under subdivision 3 of Civil Code section 1479 it is provided that in the event there is more than one obligation of a particular class, a performance must be credited to all obligations in that particular class ratably. It is appellee's contention that the obligation or obligations as disclosed by the note are of a particular class in that they secure a certain same indebtedness and were executed as part of one transaction.

8. Appellant has erroneously concluded that subparagraph 3 of subdivision 3 of Civil Code section 1479 provides that if two notes are dated and executed on the 6th day of June, 1930, and the 7th day of June, 1930, respectively, and a part performance in connection with the said notes is made, then such performance shall be applied to the note executed at the earlier date. Such conclusion is not in accordance with Civil Code section 1479, subparagraph 3 of subdivision 3, inasmuch as the same provides that the performance shall be credited to the obligation *earliest in date of maturity*. Appellant has apparently assumed that the said Civil Code section provides that performance shall be credited to the obligation earliest in date of execution.

Appellant has further cited as authority for such conclusion the case of *McColgan v. Sockolov*, 192 Cal. 171. An examination of the facts in such case discloses that the obligations involved had various maturity dates, and the cited case is authority to the effect that the performance should be credited to the notes bearing the

earliest date of *maturity*. The fact that the notes bearing the earliest date of execution were the notes first maturing was incidental.

It must be assumed that the $10,000.00 note matured prior to the $80,000.00 note in order to give any consideration to appellant's contention. However, appellant did not contend that there was a difference in maturity dates, but only assumed a difference in execution dates.

It appears, therefore, that no error was committed by the District Court in holding the $10,000.00 note and chattel mortgage securing the same to be a valid and existing lien in favor of F. R. Kenney and L. W. Wickes on the property described in such chattel mortgage.

B. Answering Appellant's Point Two.

The Deed of Trust Executed by the El Camino Oil Company, Ltd. and Recorded June 10, 1930, in the Office of the County Recorder of Los Angeles County, Created a Valid and Existing Trust Securing the Claim of F. R. Kenney and L. W. Wickes.

The theory of the appellant under point two is to the effect that the trust deed included real property as Parcel 1 [Tr. p. 28] and personal property as Parcel 2 [Tr. pp. 29-30]. Then, assuming Parcel 2 to be personal property, appellant contends that the trust created as to the property described in said Parcel 2 is void as the instrument creating the trust was not executed as a chattel mortgage. Thus, appellant advances two contentions:

1. That the property described in Parcel 2 was personal property. The property under consideration as described in said Parcel 2 consists of:

(a) A leasehold interest in vacant land [Tr. pp. 48-57] plus an option to purchase the said vacant land [Tr. p. 53, paragraph 3];

(b) An oil refinery located upon Parcel 2, including all machinery, equipment and fixtures and all tanks, vats, pumps, boilers, engines, meters, pipes, stills and fractionating towers in whatever manner affixed or attached to said real property.

In considering the question of whether the property involved in Parcel 2 is real or personal, it is first important to determine the definitions of real and personal property as set forth in the Civil Code of the State of California. Title I of Part I relates to the nature of property, and section 657 provides:

> "Kinds of Property.—Property is either:
> 1. Real or immovable; or,
> 2. Personal or movable."

It is thus seen that personal property is movable property, and real property is immovable property. Further, in defining real property, we find that California Civil Code, section 658 provides as follows:

> "Real or Immovable.—Real or immovable property consists of:
> 1. Land;
> 2. That which is affixed to land;
> 3. That which is incidental or appurtenant to land;
> 4. That which is immovable by law; except that for the purposes of sale, emblements, industrial, growing crops and things attached to or forming part of the land, which are agreed to be severed

before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

We thus see from section 658 that real property includes considerably more than land, and such fact is further borne out by the definition of land contained in California Civil Code, section 659, which provides:

"Land.—Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance."

Further, in construing section 658, wherein it provides that real property is that which is affixed to land, it is important to consider the provisions of California Civil Code, section 660, which provides:

"Fixtures.—A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except that for the purposes of sale, emblements, industrial, growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code, regulating the sales of goods."

In considering whether the property described in the deed of trust as Parcel 2 is real property or personal property, we will consider the same as heretofore divided under "A" and "B".

(a) As to the leasehold interest, it is to be noted that the courts of the State of California have not consistently held that a mere leasehold interest in land to be either real property or personal property. The appellant has cited certain authorities wherein a leasehold interest was held to be personal property, such cases being decided in 1904 and 1909. We wish to call the Court's attention to the case of *San Pedro, Los Angeles and Salt Lake Railroad Co. v. City of Los Angeles,* 180 Cal. 18, decided in 1919, wherein on page 21, it is held:

> "Section 3617 of the Political Code declares that the term 'property' includes 'all matters and things, real, personal, and mixed, capable of private ownership,' and that the term 'real estate' includes 'the possession of, claim to, ownership of, or right to the possession of land.' A leasehold estate carries a right to the possession of the land lease. (Civ. Code, sec. 819.) It is, therefore, real property within the above definition."

It is thus seen that the California Supreme Court in the cited case held a leasehold interest to be real property. Before proceeding to a consideration of the other property described in said Parcel 2, the Court's attention is called to the fact that the interest in the vacant land contained an option to purchase the said land in addition to the leasehold interest and thus was something more than a mere leasehold interest, and that the El Camino Oil Company, Ltd. had a further interest in the leased premises, that is, the ownership of the refinery improvements thereon which definitely determined the interest of said company to be real property as will hereinafter be pointed out.

Passing then from the consideration of the leasehold interest, we consider the other property described in Parcel 2:

(b) As to the refinery property, such property consisted of an oil refinery including all machinery, equipment and fixtures and all tanks, vats, pumps, boilers, engines, meters, pipes, stills and fractionating towers and was heavy machinery, tanks, pipes and buildings actually constructed on and attached to and part of the real property described in Parcel 2. A detailed description as to some of the said property is contained in the transcript, page 68-a. It is thus seen that the said property was actually affixed to land, and consequently, under the provisions of section 658 of the California Civil Code was real property. Such refinery property was owned by the El Camino Oil Company, Ltd. and was not leased from the owner of the land. (Although some of the property was being purchased on contracts and leases, if such property was not owned by the El Camino Oil Company, Ltd., the appellant herein could acquire no lien thereon as the act in question provides that the lien shall attach to the property of the distributor at the time of the distribution, and if at the time of the distribution, the property was not owned by the distributor necessarily no lien could attach under the terms of the act. The contract lien, of course, could apply to property, title to which was after acquired.)

The appellant seeks to overcome this definite conclusion that must be drawn from the facts, that is, that the said refinery property is real property by referring in its brief to the fact that in said trust deed it is stated that such property "shall be deemed to be real property" (App. Op. Br. p. 20), and that thus such property was recognized to

be personal property and must be so construed for the benefit of the appellant. By the same token it might be stated that such refinery property is real property since it is provided in the lease covering said land in paragraph 4 thereof [Tr. p. 54]:

> "(4) That boilers, engines, machinery, tanks, vats, stills, pipes, equipment and fixtures, and all personal property erected on said leased premises by the lessee may be removed by the lessee at the termination of this lease, or any extension thereof even though the same may be attached to said premises:"

and that inasmuch as by such provision the property is recognized as real property, it must be so construed to the detriment of the appellant.

It is submitted that the language contained in both the trust deed and the lease determines that the refinery property was treated as real property. However, it is conceded that such fact alone does not definitely determine the property to be real property.

An examination of the authorities cited by the appellant does not determine the interest of the El Camino Oil Company, Ltd. in the property described in the trust deed as Parcel 2 to be personal property. Considering briefly the authorities cited by the appellant, first is found the case of *J. S. Potts Drug Co. v. Benedict,* 156 Cal. 322, which holds that a mere leasehold interest is a chattel real and is personal property. There is no evidence that the owner of the leasehold interest owned any immovable or real property on the leased premises as in the present case. Also appellant cites the case of *Summerville v. Stockton Milling Co.,* 142 Cal. 529, wherein the facts are similar to the *Potts Drug Co. v. Benedict* case, and the

decision is the same. As heretofore pointed out, the authorities cited by the appellant are inconsistent with the case of *San Pedro, Los Angeles and Salt Lake Railroad Co. v. City of Los Angeles (supra),* and that the courts of California are in conflict as to whether mere leasehold interests are real or personal property. However, the case of *Commercial Bank v. Pritchard,* 126 Cal. 600, *definitely determines that the interest of the El Camino Oil Company, Ltd. in and to the property described as Parcel 2 in the deed of trust is real property.*

In such case a lease of vacant land was made for a warehouse site for a term of five years with the option of either party to terminate the lease upon thirty days notice in writing and with the right to the lessee to remove the warehouse erected upon the leased ground at the termination of the lease and to renew the lease at the expiration of the term for a like period, the Court holding that such an interest was real property.

The interest of the lessee in the cited case was almost identical with the interest of the El Camino Oil Company, Ltd. in Parcel 2, and an examination of the lease relating to Parcel 2 [Tr. pp. 48-57], discloses that the lease was for ten years, gave authority for the erection by the lessee of a refinery [Tr. p. 52, paragraph 12], gave the lessee an option or right to purchase the leased land [Tr. p. 53, paragraph 3], gave the lessee the right to remove the refinery property erected on the premises [Tr. p. 54, paragraph 4], and gave the right of the lessee to renew the lease for a further term of five years upon its expiration [Tr. p. 53, paragraph 2].

Pursuant to such agreement the El Camino Oil Company, Ltd. erected upon such leased property a refinery. Some of the said refinery plant must be conceded to be

real property as being immovable and affixed to land. The case of *Commercial Bank of Santa Ana v. Pritchard (supra)*, definitely determines that since the improvements on the leased property were owned by the lessee and since such improvements were affixed to the real property, the improvements and the lease itself considered together were real property and were subject to a conveyance or encumbrance as real property by a deed or mortgage. It is, therefore, the contention of appellee that the cited case is definite authority that the interest of the El Camino Oil Company, Ltd. in and to said Parcel 2 is real property, and the Court is respectfully requested to read the complete decision in the case of *Commercial Bank of Santa Ana v. Pritchard,* 126 Cal. 600, as the same is considered decisive as to appellant's point two.

Further, under point 2, in addition to the contention advanced by the appellant that the property described in Parcel 2 was personal property as hereinbefore discussed, the second contention of the appellant is:

2. That the trust created as to said Parcel 2 is void as the instrument creating the trust was not executed as a chattel mortgage.

While appellee herein feels that the authorities hereinbefore cited definitely determine the interest of the El Camino Oil Company, Ltd. in Parcel 2 to be real property, nevertheless, it is likewise the contention of the appellee that the trust created as to Parcel 2 by virtue of the deed of trust is absolutely valid irrespective of whether the property therein described is real or personal property. Appellant's contention as to the invalidity of the trust is, of course, based upon the theory that the property described in the trust deed as Parcel 2 is personal property, and for the purpose of the argument, hereinafter it will

be assumed the property described in Parcel 2 to be personal property.

The Court's attention is directed to the fact that said deed of trust included Parcel 1 which is conceded by the appellant to be real property, and it is the appellee's contention that there can be created a valid trust affecting real and personal property under the terms of a trust deed as was used herein. Directing the Court's attention to the California law in relation to the creation of a trust, it is found that section 2220 of the Civil Code provides as follows:

> "Purposes for which trusts may exist.—A trust in relation to real and personal property, or either of them, may be created for any purpose or purposes for which a contract may be made."

Said section 2220 of the Civil Code was amended to read as above set forth in 1929. Prior thereto, the section provided as follows:

> "For what purpose a trust may be created.—A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise prescribed by the titles on uses and trusts and on transfers."

Prior to such amendment of 1929, there was no specific provision in California law for the creation of an express trust as to personal property, that is, to the creation of a trust by agreement; there could, of course, be an implied trust created by law as to personal property, and, in fact, by decision, the California courts prior to 1929 recognized

the fact that a trust could be created as to personal property for any lawful purpose. However, the amendment of section 2220 in 1929 clarifies any question that there might be regarding the creation of such a trust, and, in fact, and by an examination of additional California code sections, it is seen that a so-called deed of trust can be a trust instrument as to personal property. For instance, an examination of section 725-a of the California Code of Civil Procedure discloses that the said section provides:

> "The beneficiary or the trustee named in a deed of trust upon real property *or any interest therein* to secure a debt or other obligation shall have the right to bring suit to foreclose the same, . . ." (Italics appellee's.)

In other words, the use of the words "or any interest therein", clearly discloses that a trust deed creating a trust can be effective upon any interest in real property, whether such interest is personal property or otherwise.

Furthermore, *a trust need not be created and acknowledged* as a chattel mortgage. In fact, the only provision as to how the same shall be created is set forth in section 852 of the California Civil Code, which provides:

> "Created by writing or by law.—No trust in relation to real property is valid unless created or declared
>
> 1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;
>
> 2. By the instrument under which the trustee claims the estate affected; or,
>
> 3. By operation of law."

Certainly in the present case the trust agreement meets the requirements set forth in Civil Code, section 852. Furthermore, the authorities hold that no specific form is necessary to create a trust, the instrument need only express the intention of the parties. In fact, as heretofore pointed out, the only requirement relative to the execution of a trust is set forth in section 852 of the Civil Code, and the validity of a trust so executed is further recognized by section 2221 of the Civil Code, which provides:

> "Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the truster and beneficiary, by any words or acts of the truster, indicating with reasonable certainty:
>
> 1. An intention on the part of the truster to create a trust; and,
>
> 2. The subject, purpose, and beneficiary of the trust."

Further, a creation of a trust is not the creation of a lien. In fact, it is held *"in legal effect a deed of trust does not create a lien* or encumbrance upon the property, but conveys legal title to the trustee" (italics appellee's), *Weber v. McCleverty,* 149 Cal. 316, and it is further held that it is legally impossible for a trustee to have a lien on the property.

As heretofore pointed out, the argument in behalf of the State of California seems to be that since the property involved and described in the trust deed was to a great extent personal property, the trust created thereby

was void, and in connection therewith we wish to call the Court's attention to the case of *H. A. McDonald v. Smoke Creek Live Stock Co.,* 209 Cal. 231. In the cited case an instrument in the form of a deed of trust was executed covering both real and personal property, and thereafter the property was sold at a trustee's sale, and the action was one in which the purchasers and other claimants were litigating title to the property involved. The appellant contended that by virtue of the nature of the property, being both real and personal, the instrument was, therefore, one which was, in fact, an equitable mortgage requiring legal foreclosure. The Court sustained the judgment of the lower Court, holding that:

> "An instrument by which both real and personal property are conveyed to a trustee to secure payment of an indebtedness, which provides, upon default in the performance of its terms, for the sale of the property by the trustee, free and clear of any right of redemption, and also provides, in such event, for its foreclosure in a court of competent jurisdiction, is none the less a deed of trust, notwithstanding the dual nature of the remedies provided therein for its enforcement or the nature of the property conveyed, and such instrument is not required to be enforced by a suit in foreclosure, but the trustee may sell under its terms in case of default."

It is thus to be seen that a valid trust may be created involving real and personal property by a so-called trust deed. Further, it is contended that section 3440 of the

California Civil Code and section 2957 of the California Civil Code (such last section providing how chattel mortgages shall be executed) are not appliable to the present case for the following reasons: First, as heretofore pointed out, in 1929, section 2220 of the Civil Code was amended to specifically provide for the creation of a trust upon personal property. Second, the Civil Code sections relating as to how a trust shall be created do not require any particular form of execution or acknowledgment in connection with such creation of such trust. Such Civil Code sections specifically relate to the creation of a trust and consequently must be construed as not being affected by section 3440 of the Civil Code.

Section 3440 of the Civil Code is for the purpose of precluding fraudulent sales, and at the time the section was adopted, the California Legislature expressly contemplated the execution of chattel mortgages on personal property. At such time a trust as to personal property was not expressly contemplated by the Legislature, it being only in 1929 that the Legislature for the first time definitely contemplated trusts as to personal property. However, the specific provisions of section 2221 of the Civil Code, which provides in what manner a trust shall be created, determines the trust in the present case to be valid.

It is contended by the appellee herein as hereinbefore set forth that the deed of trust recorded June 10, 1930, created a valid trust in favor of F. R. Kenney and L. W. Wickes as to the property described in such deed of trust as Parcel 2 upon the ground that said property was real property, and further upon the ground that assuming the property in Parcel 2 to be personal property, the trust deed created a valid trust as to such personal property.

C. Answering Appellant's Point Three.

The Deed of Trust and Chattel Mortgage in Favor of F. R. Kenney and L. W. Wickes, Recorded June 10, 1930, Constitutes a Valid Lien Upon the Properties Described in Said Documents Prior and Paramount to Any Claim of the State of California as to Said Properties for Penalties Added to License Tax Due on Account of Motor Vehicle Fuel Sold and Delivered by the Camino Oil Company, Ltd. From and Including April 1, 1930, to and Including June 10, 1930.

Appellant's third point (App. Op. Br. pp. 26-31) is to the effect that penalties accruing August 15, 1930, upon the taxes due on account of motor fuel sold and delivered from the 1st day of April, 1930, to and including the 10th day of June, 1930, are a lien on the property of the El Camino Oil Company, Ltd., and became such a lien at the time of the distribution of the motor fuel, that is, prior to June 10, 1930.

The contention of appellant is predicated upon the theory that:

1. The act provides that the penalties shall be a lien on the property of the distributor, and in connection therewith it is important to consider the language of the act in question as it existed at the time of the distribution herein involved. Secton 4 of the California Motor Vehicle Fuel License Tax Act (California Statutes 1923, p. 572; Amended Statutes 1925, p. 659) in 1930 provided as follows:

> "Sec. 4. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September

thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. *Said tax shall be a lien* upon all of the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock p. m. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency." (Italics appellee's.)

It is to be noted from the foregoing that the act provides that the *tax* shall be a lien, but that the act is entirely silent as to any lien in connection with penalties therein provided for.

It is interesting to note that the legislature of the State of California amended the act in question, and in particular, section 4 thereof in 1931 so as to provide:

> "The controller shall seize any property, real or personal, used by said distributor in the operation of his business, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, *to pay the tax due hereunder, together with any penalty or penalties imposed hereby for such delinquency,* and any and all costs that may have been incurred on account of such seizure and sale." (Italics appellee's.)
>
> *California Motor Vehicle Fuel License Tax Act,* Section 4 as amended by Statutes 1931, pp. 105, 1652, 2001 and 2288.

It is interesting to note that in amending the act in 1931 the legislature specifically provided that the property could be sold to satisfy in addition to the tax penalties imposed for delinquency. In fact, the language of the amendment provides first, *"to pay the tax due hereunder,"* and then further, *"together with any penalty or penalties,"* distinctly *recognizes that the tax and the penalties are not one.* If, as is the contention of the appellant herein, the tax and the penalties are one, why did the amendment in 1931 specifically provide for the sale to include a recovery for penalties? Why not stop when the legislature provided "to pay the tax due hereunder," if the penalties were properly included in such language as part of the tax?

2. The theory of the appellant, after assuming the act provides for a lien for penalties, further is to the effect that the lien for penalties relates back to the time of the distribution of the motor vehicle fuel, that is, prior to June 10, 1930, although it could not be determined until August 15, 1930, that any penalty would accrue. Appellant contends that a supposed lien (which is not provided for by the act) relates back to a time at which it could not be determined that any indebtedness could exist in order to support such lien, and in support of such position appellant cites two decisions of California courts, neither of which relates to penalties, and both of which relates to taxes directly imposed upon land for the benefit of the land.

It is conceded that on the first Monday of March in the state of California certain land taxes become a lien upon real property, the amount of which is to be later determined. It is definite and certain on the first Monday of March, when such lien becomes effective, that upon assess-

ment, the amount of such tax will be determined. In the instant case, it could not be definitely determined on and prior to April 10, 1930, that on August 15, 1930, or at any other time, certain penalties would exist. It also must be considered by the Court that the tax in question is not a direct tax upon the property involved or an assessment for improvements which confers a benefit on the land and enhances the security of the land and any encumbrances thereon, and it is submitted that an act imposing a tax of such character must be strictly construed as to any lien provisions.

Finally, in connection with appellant's Point Three, it is contended that it was within the discretion of the Court in this equity proceeding to disallow the appellant's claim for penalties, and that having such authority to disallow such penalties, the Court could properly determine in allowing the claim in what order the claim for the said penalties should rank in priority. It is conceded, of course, that an equity court need not follow the bankruptcy rule relating to penalties, but it is contended that it is discretionary with such equity court to do so.

Medfield and Medway Street Railroad, 215 Mass. 156, 163; 102 N. E. 415.

It is submitted that the District Court in determining the claim of the State of California for penalties in relation to the license tax on motor vehicle fuel sold and delivered prior to June 10, 1930, to be subject to the deed of trust and chattel mortgage in favor of F. R. Kenney and L. W. Wickes, recorded June 10, 1930, committed no error.

D. Answering Appellant's Point Four.

The Claim of F. R. Kenney and L. W. Wickes Constitutes a Lien Upon the Property Described in the Chattel Mortgage and Deed of Trust Prior to and Paramount to Any Lien of the Appellant Upon Said Property for License Taxes Due on Account of Motor Vehicle Fuel Sold and Delivered by the El Camino Oil Company, Ltd., Subsequent to the 10th Day of June, 1930.

The theory of appellant as to Point Four is to the effect that:

1. The legislature of the State of California has the power to make a tax lien paramount to an antecedent contract lien; and

2. That the California Motor Vehicle Fuel License Tax Act, section 4, as it existed in 1930, made the lien provided for in said section paramount to pre-existing contract litigation.

The appellee herein does not dispute the authority of the legislature to provide that upon a sale of property for a tax lien thereon, the purchaser shall acquire a title free and clear of contract liens, even though such contract liens were antecedent to the tax lien. However, it is the contention of appellee herein that section 4 of the said California Motor Vehicle Fuel License Tax Act did not make the lien provided for therein paramount to pre-existing contract liens.

The general rule as to rank of liens is provided in the California Civil Code:

"2897. First in Time—Bottomry Excepted.—Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia."

The Supreme Court of the State of California has from time to time considered the question as to whether tax liens are paramount to pre-existing contract liens, and there are two leading cases in the State of California on such subject. The first case decided in 1897 is *California Loan and Trust Co. v. Weis,* 118 Cal. 489. Said case interpreted various provisions of the California Political Code making the lien for personal property taxes a lien on the real property of the owners of such personal property. In such case it was held that the said tax lien was superior to pre-existing contract liens. The following quotations from such case clearly disclose the reasoning for the ruling of the Court in such case and establishes that the lien was expressly made by the Political Code paramount to antecedent contracts liens:

"It still remains to be considered, before leaving this branch of the case, whether the legislature of this state has, in the exercise of an unquestioned power, made the lien of its taxes paramount. As this matter, the power being conceded, depends for its determination entirely upon statutory enactment, adjudications in sister states will be of little value unless based upon identical laws.

"Our Political Code provides: 'Sec. 3717. Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock M. of the first Monday of March in each year.' "

" 'Sec. 3716. Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.' "

"After further provisions for the sale of the real property for all such delinquent taxes, it is provided:

" 'Sec. 3788. *The deed conveys to the grantee the absolute title to the land described therein . . . free of all encumbrances, except the lien for taxes which may have attached subsequent to the sale.*' "

"No distinction is made by these laws between the lien which exists upon the land for the tax on personalty and the lien which exists for the tax upon the land itself. 'Every lien' created by this title remains until the taxes are paid or the property sold. *The title which the purchaser gets under the enforcement of any tax lien by sale is free from all encumbrances.*" (Italics appellee's.)

California Loan and Trust Co. v. Weis, 118 Cal. 489, at pp. 493-494.

It is important at this point to determine whether the act in the present case should be governed by the decision in the *California Loan and Trust Co. v. Weis* case, *supra,* and in considering the act in question, it is found that the same provides as follows:

"Sec. 4. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September

thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. Said tax shall be a lien upon all of the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock p. m. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency."

Section 4 of the California Motor Vehicle Fuel License Tax Act (California Statutes 1923, page 572, Amended Statutes 1925, page 659) provided as above.

A comparison of the Political Code sections set forth in the *Weis* case with section 4 of the California Motor Vehicle Fuel License Tax Act discloses that there is no provision in the license tax act providing that upon sale pursuant to such act title to the property sold should pass to the purchaser free of all encumbrances except liens for taxes. Thus the *California Loan Co. v. Weis* case is not decisive in the present matter.

Considering then the other leading California case decided in 1918, being the case of *Guinn v. McReynolds,* 177 Cal. 230, it is found that such case is an interpretation by the California Supreme Court as to the lien provided for in section 2322-a of the Political Code giving counties a lien for the expense of eradicating infectious

diseases and insect pests under the direction of the Horticultural Commissioner on private property. The Court states that such statutory lien bears an analogy to a tax or special assessment, and that a tax lien does not rank ahead of a pre-existing mortgage or other contract lien unless so provided by the act creating the lien. It is contended by the appellee herein that such case is decisive of the question herein involved, and that the quotations from such case as hereafter set forth clearly establish this contention.

> "The general rule for fixing the relative rank of liens is declared by section 2897 of the Civil Code, which declares that 'other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia.' This rule will govern unless, in any given case, the statute prescribes otherwise."
>
> *Guinn v. McReynolds,* 177 Cal. 230, at p. 232.

And further:

> "But the authorities declare, virtually without dissent, that even *a tax lien is not entitled to rank ahead of a pre-existing mortgage, or other contract lien, unless the legislative enactment creating the tax lien has given it priority.* (37 Cyc. 1143.) The priority need not be declared in express terms. It is enough if the intent to postpone contract liens appear by reasonable inference from the provisions of the act. But the authorization for displacing the earlier lien must, under all the decisions, be found in the statute." (Italics appellee's.)
>
> *Guinn v. McReynolds,* 177 Cal. 230, at p. 232.

And further:

"In dealing with tax or assessment liens, as with others, our decisions have recognized that the question of priority is one of legislative intent. *Where,* accordingly, *the tax* or assessment lien *is preferred* to an earlier contract lien, *the basis of priority is found in the statute.* In *California Loan and Trust Co. v. Weis,* 118 Cal. 489 [50 Pac. 697], it was held that the lien for personal property taxes, imposed by our law upon the real property of the person assessed, was superior to pre-existing encumbrances upon the land. The question, said the court, 'depends for its determination entirely upon statutory enactment,' and the expression of a legislative intent that the tax lien should have priority was found in sections 3716 and 3788 of the Political Code, the former declaring that the lien is not removed until the taxes are paid, or the property sold, and *the latter that the tax deed conveys to the grantee the absolute title to the land, free of all encumbrances,* excepting liens for subsequent taxes. Similarly, in *German Savings and Loan Society v. Ramish,* 138 Cal. 120 [69 Pac. 89, 70 Pac. 1067], where the lien of street improvement bonds (Stats. 1893, p. 33) was held to have priority, it was pointed out that *the statute expressly provided that the lien should be 'a first lien upon the property,'* and that it made the provisions of the Political Code for the collection of delinquent state and county taxes, including section 3788, applicable to sales under the bond act. The opinion, after referring to these features of the statute, declares that 'the intention seems to be clearly manifested that the bond lien shall be prior to all liens.' In the decisions holding that the liens of assessments levied by irrigation districts or reclamation districts rank ahead of mort-

gages earlier in time (*Williams v. Cooper,* 124 Cal. 666 [57 Pac. 577]; *Weinreich v. Hensley,* 121 Cal. 647, 656 [54 Pac. 254]), there is no specific reference to any statutory declaration of such priority. But, on the examination of the acts involved, it will be seen that they plainly show the legislative intent. *The irrigation district law provides that the deed of the collector conveys to the grantee absolute title, free of all encumbrances,* except when the land is owned by the United States or this state. (Stats. 1887, p. 41.) The Political Code contains similar provisions with respect to reclamation districts. (Pol. Code, sec. 3466.)" (Italics appellee's.)

Guinn v. McReynolds, 177 Cal. 230, at pp. 232 and 233.

It is to be noted that in the decision of the Court in the *Guinn v. McReynolds* case the cases discussed therein where the tax lien was held prior to a pre-existing contract lien, some express language was found relative to the fact that upon a sale pursuant to such lien, title was passed free and clear of existing encumbrances, or that the lien was a first lien. The Court in said case further in considering section 2322-a of the Political Code states:

"The section is silent on the subject of priority. The purpose of the expenditure for which the lien is given would not, of itself, justify a conclusion that the legislature must have intended to give it superiority over all other claims, if, indeed, such inference can ever arise from the mere nature of the charge. *In the case of assessments for local improvements, it may be said that the improvement confers a benefit on the land itself, and thus enhances the security of the mortgagee.* But this is not necessarily true of expenditures made under the law here in question.

> The destruction of infected or diseased trees may diminish the value of the land, for the benefit, primarily, of adjoining property." (Italics appellee's.)
>
> *Guinn v. McReynolds,* 177 Cal. 230, at pp. 233 and 234.

And in deciding the said case, the Court stated:

> ". . . we do not find in the act any provision indicating an intention to make the county lien superior to existing mortgages, and *it must be held,* as was held by the court below, *that the mortgagee is not affected by the subsequently attaching lien of the county."* (Italics appellee's.)
>
> *Guinn v. McReynolds,* 177 Cal. 230, at p. 234.

It is submitted that the facts in the present case bear a close analogy to the facts in the case of *Guinn v. McReynolds, supra, for the following reasons:* The tax in the present case is not a tax on the property itself nor in the nature of an assessment for local improvements that might confer a benefit on the land and a benefit to the security of the liens. Further, the act under consideration does not contain any provision from which it can be concluded that upon a sale pursuant to the lien provided for by said act, such sale conveys to the purchaser title free from existing encumbrances.

Directing the Court's attention to the language of section 4 it is found that the only provisions contained in said section 4 relating to the effect of the lien to be as follows:

1. "Said tax shall be a lien upon all of the property of the distributor."
2. "It shall attach at the time of the delivery or distribution subject to the tax."

3. "shall have the effect of an execution duly levied against all property of the distributor" and
4. "shall remain until the tax is paid or the property sold for the payment thereof."

It is not contended by the appellant that the first three provisions above enumerated contribute any inference that the lien shall be prior to pre-existing contract liens. However, the appellant contends that the fourth provision above set forth gives the lien provided for in the act priority over pre-existing contract liens.

It is, therefore, important to consider such language, which is, "and shall remain until the tax is paid or the property sold for the payment thereof." The act prior to such language merely provided that the tax should be a lien, that the lien should attach at a certain time, and that it should have the effect of an execution duly levied. The execution that is therein referred to, of course, is the same as an execution issued pursuant to a judgment obtained in the usual procedure, and in considering what is the effect of an execution duly levied upon property, it is found that California Code of Civil Procedure provides in section 688 as follows:

> ". . . Until a levy, property is not affected by the execution; but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution; provided, however, an alias execution may be issued on said judgment and levied on any property not exempt from execution."

It is thus seen that upon a levy of an execution the property is bound for only a period of one year. It is also said in California Jurisprudence as follows:

"Duration, Abandonment and Loss.—Under the law of California, the lien of a judgment continues for five years from the docketing of the judgment unless the enforcement of the judgment be stayed on appeal. When a judgment is a lien, the levy of an execution within that period neither creates any new lien nor extends the judgment lien. Consequently, in order for a judgment creditor to preserve the priority acquired by the lien of his judgment, he must cause a sale thereunder to be made during the statutory period of the lien.

"Abandonment and loss.—If personal property which has been levied upon under an execution is abandoned to the control of the debtor, the lien of the execution ceases to exist as against subsequent lienors. Under such circumstances the levy cannot operate to defeat a subsequent execution, and an existing mortgage lien immediately acquires priority against it."

11 *Cal. Juris.* 72, Executions, Sec. 27.

Referring again to the act in question and to section 4 thereof, it is found that if it were not for the provision that the execution should remain until the tax is paid or the property sold for payment thereof, the execution would cease to bind the property upon the lapse of one year from the date of distribution (the time the execution is deemed to be levied).

The statement that the execution lien shall remain until the tax is paid merely does away with the one year limitation as provided for in section 688 of the Code of Civil Procedure and also the further code provision to the effect that an execution on a judgment is to be issued within five years from the date of the judgment which

is provided for by California Code of Civil Procedure, section 681. The provision contained in section 4 of the act that the execution lien shall remain until the property is sold for the payment thereof certainly does not infer that upon such sale title free and clear of all encumbrances shall pass to the purchaser. In fact, a sale pursuant to an execution procured in the usual manner could well be said to remain a lien upon the property executed upon until the judgment (tax) is paid, or the property executed upon sold for the payment thereof (or one year has elapsed as provided for by C. C. P. 688).

It is submitted to the Court that the only additional effect added to execution by the language of section 4 of the act in question is to do away with the possibility of any lien claimed thereby expiring by lapse of time, and that such act does not provide that upon the sale of property pursuant to the lien granted in such act title shall be passed to the purchaser free and clear, or that the lien is a first lien.

As an illustration to the Court, let us assume that John Doe, an individual, was engaged in the distributing of gasoline and that he owned a home of the value of $5,000.00, which was homesteaded, and that on June 10, 1930, he was indebted to the State of California for taxes pursuant to section 4 of the act in question. Such act provides that the tax shall be a lien on all property of the distributor which would include, of course, his home. Let us further assume that the State attempted to make a sale of the home to satisfy its lien. Of course, under an ordinary execution the property would be exempt by virtue of being homesteaded. However, if the act in question provided that upon a sale pursuant to the lien provided for, the purchaser should acquire a clear

title, or a clear title except for subsequent tax liens, the homestead would not save the property for the debtor. Certainly the Court cannot so construe the language contained in such act.

It is submitted, therefore, that the District Court properly held that the lien of F. R. Kenney and L. W. Wickes provided for by the said chattel mortgage and trust deed was prior to any lien of the State of California as to motor fuel distributed after June 10, 1930, and that the decision of the District Court set forth in the transcript ["Memorandum of Decision," Tr. p. 75, at pp. 77-81], was correct, and this Court's attention is respectfully directed to such decision.

III.

CONCLUSION.

In concluding, it is submitted that no error was committed by the District Court, and that the decision must be affirmed in all respects.

The District Court in this matter was sitting as a court of equity, and no contention has ever been made that the claim of F. R. Kenney and L. W. Wickes was not a valid claim based upon a legal indebtedness, and that there was adequate consideration to support such claim and the lien claimed in connection therewith.

Respectfully submitted,

EARL GLEN WHITEHEAD,

Attorney for H. A. Meek as Receiver of the El Camino Oil Company, Ltd., a Corporation, Receiver and Appellee.

No. 8409

IN THE

United States Circuit Court of Appeals

IN AND FOR THE

NINTH CIRCUIT

J. N. HENDRICKSON,
Complainant,

vs.

EL CAMINO OIL COMPANY, LTD., a corporation,
Respondent.

STATE OF CALIFORNIA,
Creditor and Appellant,

vs.

H. A. MEEK, as Receiver of El Camino Oil Company, Ltd., a corporation,
Receiver and Appellee,

F. R. KENNEY and L. W. WICKES,
Creditors and Appellees.

REPLY BRIEF OF APPELLANT, THE STATE OF CALIFORNIA

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CALIFORNIA STATE PRINTING OFFICE

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Creditors and Appellees.

REPLY BRIEF OF APPELLANT, THE STATE OF CALIFORNIA

The appellees, F. R. Kenney and L. W. Wickes have filed a joint appellees' brief herein. These appellees claim to have contract liens upon the

property in the receivership estate herein, prior and paramount to the tax lien of the State of California thereon. It is undisputed that the claim of the State of California in the principal amount of $252,420.29 plus penalties in the amount of $33,-604.91, constitutes a lien upon all of the property of the El Camino Oil Company. (Tr., pp. 84–87.) However, the priority of said tax lien, and the existence and priority of the liens claimed by said individual creditors, are at issue in this appeal. But, regardless of what portion of the claims of said creditors is held to be secured, there will be insufficient assets in this estate to even pay all of the secured claims. Therefore, the real controversy herein is between said individual appellees and the State of California, and the individual creditors being represented by their own counsel, and having filed their separate brief, the interest of the receiver herein, as appellee, is purely academic. Nevertheless, he has seen fit to file an even more extensive brief, as appellee, than was filed by the real parties in interest, the individual creditor appellees. Most of this brief of the receiver presents the same contentions made by said individual creditors in their appellees' brief. Therefore, the State of California will present but a single reply brief, in response to both of said appellees' briefs. For the same reasons, this reply brief will be directed primarily to the arguments presented in the brief of the individual appellees,

Kenney and Wickes, and the references to appellees' brief will, unless otherwise specified, be to the brief of said individual creditors as appellees. In so far as the points made by the receiver are but a repetition of the points made by these appellees, no particular mention will be made of the receiver's brief. However, in so far as the receiver's brief presents any additional points, said points will be specifically answered herein.

THE FACTS

The appellant, the State of California, made a full and correct statement of the facts, in its opening brief, citing the pages of the record on appeal which support said statement. (App. Op. Br., pp. 4–8.) The appellees Kenney and Wickes, the real parties in interest in opposition to the State of California on this appeal, have accepted that statement as "fair and proper," and have therefore not made any additional statement whatsoever. (Br. of Appellees Kenney and Wickes, p. 3.) On the other hand, the appellee H. A. Meek, as receiver, notwithstanding he has no real interest whatsoever in the present controversy between the adverse lien claimants, has raised a question as to the accuracy of the statement of the appellant that the $10,000 note and chattel mortgage securing the same were executed on June 6, 1930, and that the $80,000 note and the deed of trust securing the same were executed on June 7, 1930. (Br. of Appellee Meek, pp. 4–5.)

The stipulation of facts shows that the $10,000 note and the chattel mortgage to secure the same were both executed on June 6, 1930. (Tr., pp. 22, 24, 26.) The same stipulation shows that the trust deed, purportedly securing the $80,000 note, was executed on June 7, 1930 (Tr. pp. 28, 38). Said trust deed recites that it was executed for the purpose of securing an $80,000 note "of even date herewith". (Tr., p. 30.)

Furthermore, extensive briefs were filed with the trial court upon the basis of the facts being as thus recited, and, pursuant to those briefs and the stipulations on file, said court, in its opinion, recited that on June 6, 1930, the El Camino Oil Company executed one promissory note to said Kenney and Wickes for $10,000, secured by chattel mortgage upon certain of its equipment, and on June 7, 1930, another promissory note for $80,000 secured by a trust deed upon certain real property. (Tr., pp. 75-76.) This opinion was, by the order of the court, incorporated as the findings of fact and conclusions of law of said court. (Tr., p. 87.)

Thus, the record herein squarely supports the statement of facts made by the appellant, and the belated attempt of the Receiver to cast doubt upon these facts is of no avail. In any event, it is not necessary to go further into this question of fact because of certain concessions which the appellant will make hereinbelow.

POINT I

"NO PART OF THE CLAIM OF F. R. KENNEY AND L. W. WICKES IS SECURED BY THE CHATTEL MORTGAGE OF JUNE 6, 1930"

As its first point, the appellant urged the foregoing proposition, upon the ground that the $10,000 note of June 6, 1930, which was secured by the chattel mortgage of even date, was fully satisfied, and the mortgage discharged, by the accounting had between the parties to said instruments subsequent to their execution, whereby the amount of the indebtedness of the El Camino Oil Company to said individual creditors was ascertained to have been $78,046.60, only, or, in other words, in an amount less than that of the note of June 7, 1930, purportedly the deed of trust of even date. Appellant now concedes, however, that, while the record upon this appeal discloses that the $10,000 note was of earlier date than the $80,000 note, said record does *not* disclose that the $10,000 note was of earlier *date of maturity* than the $80,000 note. For this reason, the provisions of subdivision 3 of section 1479 of the California Civil Code, set forth in appellant's opening brief, (pp. 16-17) are inapplicable.

Star Mill & Lumber Co. vs. *Porter,* 4 Cal. App. 470, 473 (1906).

While it appears from the last cited case that, under such circumstances the credit to which the debtor is entitled should be applied proportionately

amongst his several obligations, the appellant herein does not wish to press this point, inasmuch as, even if the credit in question were so applied, this would still leave an unpaid balance on said $10,000 note in excess of the value of the security afforded by said chattel mortgage. The right to such an application would therefore be of academic interest only. The appellant therefore withdraws the first point urged in its opening brief. For this reason, the other arguments presented by the respective appellees upon this first point will not be further considered herein. So far as the lien of said chattel mortgage is concerned, the appellant is content to rely upon the proposition discussed hereinbelow, that, in any event, the *entire* tax lien of the State of California is paramount to *any* contract lien which the individual claimants may have.

POINT II

THE DEED OF TRUST EXECUTED JUNE 7, 1930, BY THE EL CAMINO OIL COMPANY DID NOT CREATE AND DOES NOT CONSTITUTE A VALID AND EXISTING LIEN AS AGAINST THE STATE OF CALIFORNIA UPON THE PROPERTY DESCRIBED IN SAID DEED OF TRUST AS PARCEL II

In answering the argument of the appellant in support of the second proposition stated in its opening brief, the appellees Kenney and Wickes assert that "The flaws in appellant's argument lie in its assumptions first, that a leasehold is personal property, and second, that a conveyance in trust to

secure payment of an obligation is a chattel mortgage." (Appellees' Br., p. 9.)

A. A LEASEHOLD INTEREST IS PERSONAL PROPERTY

In support of its contention that a leasehold interest is real property, said appellees first quote section 657 of the California Civil Code which defines property as being either "1—real or immovable; or, 2—personal or movable." Said appellees then cite certain Federal Court cases to the effect that a leasehold is a chattel real and immovable. (Appellees' Br., pp. 9-10.) From this they conclude that a leasehold interest is "therefore real property by definition in California." (Appellees' Br., p. 10.) A reading of said cases discloses that there is nothing therein favorable to the contention of said appellees. On the contrary, they show that a leasehold interest is *personal property.*

However, assuming for the purpose of argument that the Federal cases cited hold that a leasehold is a chattel real and immovable, it is submitted that this cannot justify the appellees' conclusion that *in California* a leasehold interest is *real property.* The appellees concede that at common law, leasehold estates were personal property (Appellees' Br., p. 10), but contend that by reason of the provisions of said section 657 of the California Civil Code, the Legislature has clearly expressed its intention that a leasehold interest is real property. Said section 657 was intended to be a general classi-

fication, merely, and not a full and complete definition. This is demonstrated by the further definitions of different kinds of real property, as contained in sections 658 to 662 of the California Civil Code, set forth in the brief of the Appellee Meek (pp. 11-12). *None* of the definitions in said sections embrace a *leasehold interest.* And section 663, which concludes these definitions of different classes of property defines *personal property* as being "every kind of property that is not real."

In any event, of course, the California courts are the final authority upon this question as to whether a leasehold interest is real property or personal property. And even the appellees Kenney and Wickes, the real parties in interest in this appeal, concede (Appellees' Br., p. 10) that "the California courts have in several instances dealt with leasehold estates as though the same were personal property," (See cases cited in Appellant's Opening Brief, page 21.)

The receiver, however, contends that the courts of California have *not* consistently held a mere leasehold interest in land to be either real property or personal property, citing *S. P., L. A. & S. L. R. Co.* vs. *City of Los Angeles,* 180 Cal. 18 (1919) (Br. of Appellee Meek, p. 13). That case refers solely to the question of what is real property, within the meaning of California Political Code section 3617, *for purposes of taxation.* It is well settled that *for tax purposes* a leasehold interest is real property.

See *Jameson Petroleum Co.* vs. *State,* 11 Cal. App. (2d) 677 (1936), and the cases therein cited. However, even these tax cases recognize that the rule therein applied is merely an *exception* to the general rule that a leasehold estate is *personal* property. (Ibid.) It is firmly established in California that the common law definition of leasehold estates as *personal property* applies in this State in the absence of a particular statutory provision which is controlling.

Dabney vs. *Edwards,* 5 Cal. (2d) 1, 6-7 (1935), and cases cited;

Guy vs. *Brennan,* 60 Cal. App. 452, 454-455 (1923); and

Jeffers vs. *Easton, Eldridge Co.,* 113 Cal. 345 (1896).

The California cases upon this point are so clear that a minute analysis thereof would be presumptious. Appellant therefore made no error in "assuming" that a leasehold interest in California is personal property. Such is the *law* in California.

The receiver further suggests that whether or not the leasehold interest was personal property, the trust deed covers, in addition to said leasehold interest, certain fixtures, which he claims are unquestionably real property, and so the trust deed is valid as to that portion of Parcel II. (Br. of Appellee Meek, pp. 14-17.) It is worthy of note that the individual lien claimants themselves have not deemed such a contention meritorious. However,

since the receiver has raised the issue with apparent seriousness it must be answered.

The portions of the trust deed which are pertinent upon this point are as follows:

> "Trustor hereby GRANTS to TRUSTEE, IN TRUST, WITH POWER OF SALE, all that property in the City of Los Angeles County, of Los Angeles, State of California, described as:
>
> PARCEL I: Lot Nine (9), Block F, Tract 6482, as per Book 86, Pages 72-73 of Maps, Records of Los Angeles County, State of California;
>
> and also Trustor hereby grants, conveys, transfers, assigns and sets over to Trustee, in trust, with power of sale, all that property in the County of Los Angeles, State of California, described as:
>
> All Trustor's right, title and interest, as Lessee, in and to that certain written lease dated September 16, 1929, between Matilda E. Richer, Lessor, and El Camino Oil Company, a corporation, Lessee, pertaining to and covering
>
> PARCEL II: The West Five (5) acres of the North Fourteen (14) acres of the East Fifty-five (55) acres of the South Half (S $\frac{1}{2}$) of the Northwest quarter (NW$\frac{1}{4}$) of Section 8, Township 3 South, Range 11 West, San Bernardino Base and Meridian.
>
> which said lease was recorded on the 24th day of September, 1929, in Book 9300, page 229 of Official Records in the office of the County

Recorder of Los Angeles County, State of California, including Trustor's right under said lease to purchase said premises upon the terms and conditions set forth in said lease.

Said grant, transfer, and assignment of said Trustor's interest, as Lessee, in and to said lease is hereby made to said Trustee upon the express understanding and agreement between Trustor and Trustee that Trustee is not to be liable upon any of the covenants, obligations and requirements of said lease.

It is expressly understood and agreed that all that certain oil refinery located upon Parcel II above described and all that certain bulk plant located upon Parcel I above described, including all machinery, equipment and fixtures and all tanks, vats, pumps, boilers, engines, meters, pipes, stills, and fractionating towers now situated upon the above described premises, or either of them, in whatever manner affixed or attached to either of said parcels of real property, are and shall be deemed to be real property and expressly included in the above grant, transfer and assignment." (Tr., pp. 28-30.)

The real property described in Parcel II was vacant and unimproved at the time when it was leased to the El Camino Oil Company, Ltd. (Tr., p. 44.) It was leased for the purpose of erecting, maintaining and operating an oil refinery, absorption plant and cracking plant (Tr., p. 52), and said oil company accordingly erected such a refinery plant and equipment thereon. (Tr., pp. 41–45.) Under said lease, it was expressly provided that

all equipment and fixtures and all personal property erected on the leased premises by the lessee "may be removed by the lessee at the termination of this lease, or any extension thereof, even though the same may be attached to said premises," subject to certain conditions not here material. (Tr., p. 54.)

It is not necessary at this time to enter into any controversy as to what portion of said equipment was personal property and what portion fixtures, as between the lessor and the lessee. In so far as said equipment and structures were *personal property,* the trust deed was clearly invalid, for the reason that it was not executed as required for encumbrances of personal property not accompanied by a transfer of possession. And in so far as the property might otherwise have been real property, the only interest which the lessee could claim therein, and therefore the only interest therein which said lessee could, as trustor, encumber, was such rights as it had, *under the lease,* to remove said property. Such an interest, like the lease itself, is personal property, and any encumbrance thereof must be made in the manner required for personal property.

Thus, in *Summerville* vs. *Stockton Milling Co.,* 142 Cal. 529 (1904) it was held that a judgment, which constituted a lien upon all *real* property of the judgment debtor, did *not* constitute a lien upon the judgment debtor's right, *as lessee,* to certain

crops upon the land of which he was lessee. In other words, the leasehold interest, *and the lessee's right thereunder to the crops,* were *personal property.* This case has been repeatedly cited with approval by the California Supreme Court, and as recently as December, 1935, in *Dabney* vs. *Edwards,* 5 Cal. (2d) 7.

See also

Summerville vs. *Kelliher,* 144 Cal. 156 (1904); and

Belieu vs. *Power,* 54 Cal. App. 244 (1921), hearing by Supreme Court denied.

And in *Barnum* vs. *Cochrane,* 143 Cal. 642, (1904) the California Supreme Court held that a sale of hotel property situated on leased premises, *with the privilege of removal of the improvements* upon compliance with the lease, *is a sale of personal property.*

The receiver claims that the case of *Commercial Bank* vs. *Pritchard,* 126 Cal. 600 (1899), definitely determines that the improvements placed on the real property by the lessee were real property, in so far as said improvements constituted fixtures. (Br. of Appellee Meek, pp. 16–17.) In that case, the lessee of certain property, who had the right to remove, at the end of the term, a warehouse he had erected on the leased property, mortgaged said warehouse and also made an assignment of his lease to the mortgagee. "The mortgage was verified by the mortgagor and mortgagee *as a mort-*

gage of personal property, and was properly acknowledged" (126 Cal. 601; emphasis added), and was recorded as a chattel mortgage (126 Cal. 602). Thereafter, the lessee *sold* said warehouse to a third person. The mortgagee brought *action to foreclose his mortgage,* and judgment in the trial court was in favor of the purchaser of the warehouse, as against said mortgagee. On appeal, the judgment was reversed. Thus, the *decision,* was merely that a *duly executed* assignment and mortgage of a leasehold estate, impressed a lien upon the entire leasehold interest of the lessee, including his right to the improvements. Therefore, the case is really favorable to the appellant upon this proposition, and is entirely in accord with *Summerville* vs. *Stockton Milling Co., Summerville* vs. *Kelliher,* and *Barnum* vs. *Cochrane, supra.* In so far as any of the language in the opinion of the commissioners who wrote the opinion in the case relied upon by the receiver, may appear to hold that a leasehold estate, including any right thereunder to improvements, is *real property,* the opinion has been definitely disapproved by not only the concurring opinion of Mr. Justice McFarland, in that case, (126 Cal. 606) but by subsequent decisions in which said case is cited or considered. Thus, in *Guy* vs. *Brennan,* 60 Cal. App. 452 (1923), after holding that the sale of a leasehold interest was the sale of personal property rather than real property, the court said, at pages 456–457:

"There is nothing in *Commercial Bank* v. *Pritchard,* 126 Cal. 600 (59 Pac. 130) which conflicts with the foregoing views. That case, following the reasoning in *Garber* v. *Gianella,* 98 Cal. 527 (33 Pac. 458), holds that an instrument whereby a lease is *created* (emphasis added) must be deemed to be a 'conveyance' for all the purposes mentioned in sections 1213 and 1214 of the Civil Code. The court was obliged so to hold because, by section 1215 of the Civil Code, there is an express legislative declaration that the term 'conveyance,' *as used in sections 1213 and 1214,* shall embrace every *instrument,* except wills, whereby *any* estate or interest in real property is created, aliened, mortgaged or encumbered. But because the legislature has said, in effect, that, for the purposes of the law respecting the recordation of conveyances, a written instrument whereby a leasehold interest is *created* (emphasis added) shall be deemed to be a 'conveyance,' *it does not necessarily follow that the leasehold interest conveyed by such instrument is 'real estate.'* (Emphasis added.)

The words 'real property,' as defined by section 14 of the Civil Code, subdivision 3, are 'coextensive with lands, tenements and hereditaments.' The learned author of the majority opinion in *Commercial Bank* v. *Pritchard, supra,* seems to have used the terms 'real estate' and 'real property' interchangeably. It doubtless was in view of this laxity in the commissioner's use of two expressions which, technically, are not convertible terms, that Mr. Justice McFar-

land was prompted to write a separate but concurring opinion so as to avoid any possible future misconception as to the real purport and extent of the court's decision. That this was the purpose of the concurring opinion seems evident from its language, Mr. Justice McFarland saying: 'I concur in the judgment; but the opinion of the commissioner *might, perhaps* (italics ours), be construed as holding, generally, that an estate for years in land is real property, which, of course, is not so. An estate for years is, in its nature, personal property—a chattel real; and it is subject for most purposes to the law which applies to personal property. (See *Jeffers* v. *Easton,* 113 Cal. 345, where the subject is discussed and our code division of property into real and personal is shown to be, substantially, that of the common law.)'" (Emphasis by the court, except where stated to have been added.)

This latter case has also been approved by the California Supreme Court as recently as December, 1935, in said case of *Dabney* vs. *Edwards, supra,* at pp. 7–8.

It is therefore submitted that the only interest which the El Camino Oil Company in and to Parcel II in said deed of trust was and is personal property under the law of the State of California.

B. A TRANSFER OR ENCUMBRANCE OF PERSONAL PROPERTY, IN ORDER TO BE VALID AS TO CREDITORS OF THE TRANSFEROR OR ENCUMBRANCER, MUST BE ACCOMPANIED BY A

TRANSFER OF POSSESSION OR BE MADE IN THE MANNER REQUIRED FOR A CHATTEL MORTGAGE

The appellees Kenney and Wicks contend that the appellant's argument in support of its second proposition stated in the appellant's opening brief is unsound for the further reason that it assumes "that a conveyance in trust to secure payment of an obligation is a chattel mortgage." (Appellees' Br., p. 9.) Appellant submits that this is an erroneous statement. Appellant does not contend, nor is it necessary that it assume, that a conveyance in trust to secure payment of an obligation *is* a chattel mortgage. Appellant merely contends that section 3440 of the California Civil Code requires *all* transfers of personal property to be accompanied by a change of possession or to be made in the manner required for the execution of mortgages as provided by law, that is, as provided in section 2957 of the California Civil Code.

Said appellees quote section 2924 of the California Civil Code defining a mortgage. This definition excludes a transfer in trust. From this the appellees conclude that "by this express exclusion of transfers in trust from the definition of mortgages it follows that a conveyance in trust is not a mortgage, and that the rules applicable to the valid execution of mortgages, chattel or otherwise, have no application to deeds of trust." (Appellees' Br., p. 10.) However, the appellant is not relying upon the definition or nature of a chattel mortgage as

being the basis for its contention that the encumbrance here in question must be executed as a chattel mortgage in order to be valid as against the State of California. The appellant is relying upon the provisions of section 3440 of the Civil Code as requiring the transfer to be *executed as required for a chattel mortgage,* regardless of what the nature of the encumbrance may be.

In other words, under said section 3440, there are only two ways of making a transfer or encumbrance of personal property, which will be valid as against those who are the creditors of the transferor or encumbrancer. One is to accompany said transfer by an immediate delivery followed by an actual and continued change of possession of the thing transferred. The other is to make the transfer by way of a mortgage when allowed by law. Manifestly, such a mortgage, being of personal property, must be executed in the manner provided by section 2957 of the Civil Code. The encumbrance here in question was not so executed, nor was there any change of possession. Therefore, by the express provisions of said section 3440 said encumbrance is void as against the State of California.

Said appellees further attempt to avoid this conclusion by claiming that in any event they do not hold a mere lien upon the property of their debtor, but that, under their trust deed, they hold legal title. (Appellees Br., pp. 10-11.) Assuming for the purpose of argument that this is entirely true, it

does not clearly appear just how this is advantageous to the appellees. Section 3440 of the Civil Code applies to the transfer of the legal title as well as to mere encumbrances, and there was no transfer of possession as required by that section. However, even if this were not so, the statement of the appellees that the "California courts recognize the legal distinction between deeds of trust and mortgages, and hold that even though the practical effect of a deed of trust is similar to that of a mortgage containing a power of sale, nevertheless a deed of trust is not a mortgage and it is legally impossible to hold that the trustee has a lien on the property conveyed in trust, or to hold that the property is subject to a lien" (Appellees' Br., p. 11) is not true under circumstances such as are involved herein. The California cases cited following this statement in Appellees' Brief (page 11), do contain language to the effect stated by the appellees. However, when the courts of California are squarely confronted with the question of the priority of liens, said courts uniformly hold that a deed of trust *is a lien,* and, as such, subject to the general rules for determining the priority of liens.

Miller vs. *Citizens Tr. & Savings Bank,* 128 Cal. App. 295 (1932);

Wasco Creamery etc. Co. vs. *Coffee,* 117 Cal. App. 298, (1931; hearing by Supreme Court denied)

And see *San Mateo County Bank* vs. *Dupret,* 124 Cal. App. 395 (1932).

Said appellees further assert that "trusts in personalty are valid in California." (Appellee's Br., p. 11.) The appellant does not deny this. However, it should be noted that in the cases cited by the appellees in this regard there was a sufficient *transfer of possession of the res* to satisfy section 3440 of the California Civil Code. Appellant concedes that *if* said section 3440 is complied with, there may be a trust of personal property which is valid even as against other creditors of the trustor, the same as there may be a transfer of the full title to personal property, which is valid as against other creditors of the transferor *if* said section is complied with. But *no* transfer or encumbrance of personal property, by whatever legal device this is attempted, is valid as against other creditors of the transferor or encumbrancer unless there is either a transfer of possession or an encumbrance executed and recorded as required by law for a *mortgage* of personal property. In the present case there was neither. Therefore, the attempted encumbrance of the El Camino Oil Company's leasehold interest described as Parcel II in said deed of trust is void as against the State of California.

The receiver has not added any substantial argument to that presented by the other appellees and answered hereinabove. In particular it should be noted that *neither* of the appellees make any effort to answer the case of *Farmers State Bank* vs. *Schell,* 214 Pac. 825 (Wash. 1923) which squarely

holds in accordance with the contention of the appellant herein.

The District Court erred in holding that the trust deed here in question created and constitutes a valid and existing lien as against the State of California, as to Parcel II described in said trust deed. Said Parcel II, being solely the interest of the El Camino Oil Company under its *lease,* is *personal property.* As personal property, *any transfer* or encumbrance thereof is subject to the provisions of section 3440 of the California Civil Code: to be valid as against other creditors, the transfer or encumbrance must be accompanied by a change of possession, or must be executed as required for a chattel mortgage. In the present case neither of these requirements was fulfilled. The order of the District Court should be modified accordingly.

POINT III

THE DISTRICT COURT ERRED IN ORDERING THAT SAID CLAIM OF F. R. KENNEY AND L. W. WICKES CONSTITUTES A LIEN UPON THE PROPERTY DESCRIBED IN SAID CHATTEL MORTGAGE AND DEED OF TRUST, PRIOR AND PARAMOUNT TO THE LIEN OF THE STATE OF CALIFORNIA UPON SAID PROPERTY, FOR PENALTIES ADDED TO LICENSE TAXES DUE ON ACCOUNT OF MOTOR VEHICLE FUEL SOLD AND DELIVERED BY THE EL CAMINO OIL COMPANY, LTD., FROM AND INCLUDING THE 1st DAY OF APRIL, 1930, TO AND INCLUDING THE 10th DAY OF JUNE, 1930

In reply to this third proposition of the appel-

lant, the appellees Kenney and Wickes assert that the statement of the appellant that since the penalty, when and if it arises, becomes a part of the tax, the lien for the penalty must date back to the time of the accrual of the tax "is not well taken in law or logic. It is not logical for the reason that there are open alternatives and the arbitrary choice of the alternative favorable to the appellant is wish-thinking, not reason." (Appellee's Brief, pp. 12-13.)

In its opening brief the appellant pointed out that this court has ruled that the penalty which is provided for by the tax statute here involved, is a part of the tax, and, as such, is a lien upon the property of the tax debtor in the hands of the receiver.

State of California vs. *Hisey,* 84 Fed. (2d) 802, 805; and cases cited, especially,
Appeal of City of Titusville, 108 Pa. 600; and *Northern Finance Co.* vs. *Byrnes,* 5 Fed. (2d) 11, at 12 (8 C.C.A.1925).

Furthermore, as was pointed out in appellant's brief herein, the tax statute in question specifically provides that "said tax shall be a lien upon all of the property of the distributor. It shall attach at the time of the delivery or distribution subject to the tax * * * " and if said tax is not paid prior to the delinquency date specified in said section "ten per cent penalty shall be added thereto for delinquency." (Section 4 of Calif. Stats. of 1923, p. 572, as amended by Calif. Stats. 1925, p. 659.)

From the foregoing decisions and from the statute itself the appellant, by the process that the appellees choose to designate as "wish-thinking," reached the conclusion that the lien for the penalties necessarily attached at the time specified in the statute, namely, at the time of the delivery or distribution subject to the tax. If this be wish-thinking, then the appellant trusts that this honorable court will be "guilty" of the same thinking process.

Said appellees state that "It is just as logical, and more natural, to maintain that the lien for the penalty attaches at the time the penalty comes into existence, as to maintain the lien dates back." (Appellees' brief, page 13.) Said appellees entirely overlook, however, the specific provision of the statute that the lien shall attach "at the time of the delivery or distribution, subject to the tax." In the language of this court in *State of California* vs. *Hisey, supra,* "If the penalty, as well as the tax, is a lien upon the property in the hands of a receiver, as the statutes of California provide, it is difficult to see how the payment of the penalty can be differentiated from the payment of the lien for the tax."

The case of *W. P. Fuller & Co.* vs. *McClure,* 48 Cal. App. 185, cited by said appellees (Appellees' brief, page 13) is not at all in point, nor does it relate to a situation which is even analogous to that which is involved herein. The California cases

cited by the appellant (Appellant's Op. Br., p. 28) clearly demonstrate the theory upon which tax liens are related back to the date as of which the statute prescribes the lien shall attach. If the penalty, as a part of the tax, is a lien the same as the tax, then there would appear to be no reason why this same doctrine should not apply with regard to the lien for said penalties.

The receiver, as appellee, in addition to presenting substantially the same contention (Brief of Appellee Meek, pp. 25–26), again conceives it as his duty to present in addition thereto, the further propositions that, (1) the state *does not even have a lien* for its penalty, (Brief of Appellee Meek, pp. 23–25) and that (2) in any event, it was purely within the discretion of the District Court to entirely *disallow* the appellant's claim for penalties. (Brief of Appellee Meek, p. 26.) Even the District Court below has decided adversely to these contentions of the receiver. Said court squarely held that the claim of the State of California including the penalty, *is a valid and existing claim* against the receivership estate, *and a lien* upon all of the property of the El Camino Oil Company, Ltd. (Tr., p. 84.) Thus, if, as said appellee contends, it is within the *discretion* of the District Court to allow or disallow the claim for penalties, said court has exercised its discretion in favor of the appellant. Furthermore, this proposition of said appellee, is utterly unsound, and squarely con-

trary to the decision of this court in *State of California* vs. *Hisey, supra.*

As to said appellee's contention that the penalties do not constitute a *lien* under the provisions of section 4 of the tax act here in question, it is submitted that said *Hisey* case again is squarely contrary to the position taken by the receiver herein. Said receiver, however, points to the amendment of said section 4, in 1931, providing for the enforcement of the lien of the tax by seizure and sale of certain property of the tax debtor by the State Controller. (Section 4 of Calif. Stats, 1931, pp. 105, 1652, 2001 and 2288, as cited in brief of Appellee Meek, pp. 24–25.) The appellant is pleased that said appellee has chosen to call this amendment to the attention of this court. For the amendment does not, as said appellee contends, show that the lien which had theretofore existed, did not include the penalties which were added to the amount of the tax. On the contrary, said 1931 amendment clearly shows that the tax lien had always included the entire amount of the tax indebtedness including the penalties added thereto by reason of delinquency.

Prior to said 1931 amendment, the only method for enforcing the lien which was created by section 4 of the tax statutes was by an action in a court of equity to enforce said lien. (See *State of California* vs. *Hisey,* 84 Fed. (2d) 802, at 804.) Manifestly, the Legislature deemed that this method of

enforcing the lien was entirely inadequate. Therefore, in 1931, without in any degree or in any particular changing the *lien,* the Legislature added certain provisions to section 4 for the *enforcement* of said lien by seizure of the property by the State Controller. The portion of section 4 of the tax act quoted by the appellee Meek at page 24 of his brief, (i.e., the amendment of 1931) does not *create* a lien for the penalties. It *assumes the existence* of such a lien and merely provides an additional method of enforcing the lien which already existed under the statute.

Thus, even if the question were a new one and had not previously been ruled upon by this court, it would follow as a matter of principle that the penalties which were added to the amount of the tax upon delinquency, became a part of said tax and were secured by the same lien which secured the principal of the tax. The District Court herein has so ruled. Said District Court therefore erred in making its order that the lien for penalties which were added to the taxes which had accrued prior to the recording of the mortgage and trust deed of the appellees Kenney and Wickes did not attach as of the same date that the lien for said taxes attached, namely, at the time of the delivery or distribution subject to the tax.

POINT IV

SAID DISTRICT COURT ERRED IN ORDERING THAT THE CLAIM OF F. R. KENNEY AND L. W. WICKES

CONSTITUTES A LIEN UPON THE PROPERTY DESCRIBED IN SAID DEED OF TRUST AND CHATTEL MORTGAGE PRIOR AND PARAMOUNT TO THE LIEN OF THE STATE OF CALIFORNIA UPON SAID PROPERTY FOR LICENSE TAXES DUE ON ACCOUNT OF MOTOR VEHICLE FUEL SOLD AND DELIVERED BY SAID EL CAMINO OIL CO., LTD., SUBSEQUENT TO THE 10th DAY OF JUNE, 1930, TOGETHER WITH PENALTIES THEREON FOR DELINQUENCY

In regard to this fourth proposition of the appellant, neither of the appellees dispute the *power* of the Legislature to make a tax lien paramount to an antecedent contract lien. Each of said appellees, however, contends that the Legislature of the State of California has not, in the tax law here in question, exercised this power. The question is thus solely one of statutory construction.

The appellees Kenney and Wickes have divided the provisions of the statute relating to the effect of the tax lien into two parts. They state that the statute, after creating the tax lien, provides, first, that the lien shall have the effect of an execution duly levied against all property of the distributor, and, secondly, that said lien shall remain until the tax is paid or the property sold for the payment thereof. Referring to the first of these provisions the appellees argue that since execution liens do not have priority over antecedent contract liens, the legislative intention is thereby made apparent that the tax liens should not take priority over

valid liens prior in time. (Appellees' brief, pp. 14–16.) Appellant does not rely on this portion of the statute as having the effect of making the tax lien paramount to antecedent contract liens, so the argument of the appellees based thereon need not be answered.

Referring to the second portion of the statutory provisions relating to the effect of the lien, the appellees Kenney and Wickes state that "it is clear that such language was added in order to remove a possible bar to enforcement of the tax lien after a period of five years." (Appellees' brief, p. 16.) In other words, they contend (as the appellant contended in the case of *Sunset Oil Company* vs. *State of California,* No. 8182 before this court, decided January 18, 1937), that the statutory provision that the tax lien shall remain until the tax is paid or the property sold for the payment thereof relates solely to the *duration* of the lien rather than to its *dignity.*

Conceding, for the purpose of argument, that *one* effect of said provision may be to remove a possible bar to enforcement of the tax lien after a period of five years, it does not necessarily follow that this is the *only* effect of said provision. Nor do the appellees present any sound reason for such a conclusion. Rather, they merely *assume* this conclusion. There is nothing in the statute or in reason which justifies such an assumption.

Furthermore, this assumption merely evades the

question. Clearly, if a lien is of the "duration" which is provided for the tax lien in question, it is of paramount "dignity" to any other lien which may exist upon the property. Otherwise it could not *be* of the prescribed "duration." As was pointed out in appellant's opening brief, it is not apparent how it would be possible for the tax lien to remain until the tax is paid or the property sold for the payment thereof, if the tax lien is inferior to antecedent contract liens the enforcement of which might wipe out the tax lien. A tax lien can not bind property until the tax is paid, if, without the tax being paid at all, it can be wiped out by the foreclosure of an earlier dated mortgage or trust deed.

The appellees place great reliance upon the case of *Guinn* vs. *McReynolds* (1918) 177 Cal. 230, 170 Pac. 421, as supporting their contention that it does not appear by reasonable inference from the provisions of the Motor Vehicle Fuel License Tax Act that the Legislature intended that the tax lien created by said act should be paramount to antecedent contract liens. It is true that said case holds that a certain tax lien there in question was not paramount to an earlier dated mortgage lien. The court said, "We find nothing in section 2322a of the Political Code which can be said to indicate an intent to make the county's lien superior to other liens earlier in time." That section provided for the eradication, by the county horticultural commissioner, of infectious pests, and at the time involved in said case, contained the following pro-

visions, only, in regard to the existence and status of a lien for the charges there in question:

> "The expense thereof shall be a county charge, and the board of supervisors shall allow and pay the same out of the general fund of the county. Any and all sum or sums so paid shall be and become a lien on the property and premises from which said nuisance has been removed or abated in pursuance of this chapter. A notice of such lien shall be filed and recorded in the office of the county in which the said property and premises are situated, within thirty days after the right to the said lien has accrued. An action to foreclose such lien shall be commenced within ninety days after the filing and recording of said notice of lien, which action shall be brought in the proper court by the district attorney of the county in the name and for the benefit of the county making such payment or payments, and when the property is sold, enough of the proceeds shall be paid into the county treasury of such county to satisfy the lien and costs; and the overplus, if any there be, shall be paid to the owner of the property, if he be known, and if not, into the court for his use when ascertained."

In the principal case, on the other hand, when the State's tax lien accrued the tax statute specifically provided that the lien for the taxes here in question "shall remain until the tax is paid or the property sold for the payment thereof." Clearly, the decision in the cited case can not control here, in view of the very evident differences between the

statutory provisions relating to liens in the respective cases. The cited case does not even purport to construe the effect of such a statutory lien as is involved in the principal case.

The appellees seek to distinguish the case of *California Loan & Trust Co.* vs. *Weiss* (1897), 118 Cal. 489, 50 Pac. 697, upon the ground that the language of the decision with respect to the provisions of section 3716 of the California Political Code, providing that the lien for personal property taxes shall remain until the tax is paid or the property sold for the payment thereof, "is mere dicta, and it is submitted that, in the light of the great weight of authority to the contrary, further weight should not be given to this unguarded dicta." (Appellees' Br., p. 18.) However, one of the decisions which the appellees cite as constituting the "great weight of authority," clearly demonstrates that other *courts* do *not* consider that the language of the California Supreme Court in said *Weiss* case as merely "unguarded dicta."

See

Scottish American Mortgage Co. vs. *Minidoka County* (Idaho, 1928), 272 Pac. 498, 501.

In that case the Idaho court *expressly rejected* the interpretation of the California Supreme Court, not as "unguarded dicta," but as being an *erroneous decision*. However, the decision in the *Weiss* case is the law in California, and was the law for a period long prior to the time when the Legislature

borrowed the same language which was used in said section 3716, for use in the lien provisions of the Motor Vehicle Fuel License Tax Act. Under the circumstances it certainly can not be assumed that the California Legislature intended to use said language in any other sense than that in which it was construed by the California Supreme Court.

The decisions in other states manifestly can not be of any bearing upon the question of the proper construction to be placed upon the language in question, *when used by the California Legislature after the decision in the Weiss case.* However, lest it be assumed that the appellant concedes that the "great weight of authority" is opposed to the decision reached in California, this court's attention is invited to the following cases which are in accord with the decision reached in this State:

Eaton's Appeal, 83 Pa. State 152;
Union Central Life Insurance Co. vs. *Black,* 247 Pac. 486 (Utah, 1926);
New York Terminal Co. vs. *Gaus,* 98 N. E. 11 (N. Y., 1912);
In re Century Steel Co. of America, 17 Fed. (2d) 78 (2d C. C. A., 1927);
Seaboard National Bank vs. *Rogers Milk Products Co., Inc.,* 21 Fed. (2d) 414, 418 (2d C. C. A., 1927).

Thus, it appears that, to say the least, the view of the California Supreme Court upon the question is not singular.

Finally, this court has already held in the recent case of *Sunset Oil Company* vs. *State of California* (No. 8182, decided January 18, 1937), that the lien of taxes such as those here in question is paramount to antecedent contract liens. At the time the appellant's opening brief was filed herein, the cited case had been decided, but the opinion therein omitted any reference to the question of the priority of the tax lien, notwithstanding that question was necessarily decided in said case. This was pointed out in the appellant's opening brief herein (p. 37). Thereafter, on February 15, 1937, this court, on its own motion, made an order amending the opinion theretofore filed therein, by the addition of the following paragraph immediately preceding the closing paragraph of the opinion:

> "The appellant purchased all the property of the Sunset Pacific Oil Company at foreclosure, held Dec. 14, 1934. The sale was confirmed Dec. 29, 1934. The mortgage foreclosed antedated the lien for the gasoline tax in dispute. The purchaser claims that the mortgage lien is superior to the tax lien, and hence that the sale of the property extinguished the tax lien. The gasoline tax law of the State of California provided that the gasoline tax lien upon the property subject thereto 'shall remain until the tax is paid, or the property sold for the payment thereof.' This language was borrowed from Sec. 3716 of the Political Code of California. In 1897, before the enactment of the gasoline tax law (Cal. Stats. 1925, p. 659, sec. 4) here

involved, the Supreme Court of California had held that this language used in Sec. 3716 of the California Political Code, supra, gave a prior and paramount lien for taxes. *California Loan and Trust Co.* vs. *Weiss,* 118 Cal. 489. By the use of this language, so construed by the Supreme Court of California, in its subsequent legislation with relation to the lien of gasoline taxes, it must be held that the legislature intended the language to have the effect attributed to it by the Supreme Court in its prior opinion, hence it must be held that the tax lien for the gasoline taxes here in question was unaffected by the foreclosure and sale above mentioned."

The decision of the court below should therefore be modified so as to order that the lien of the State of California is, in any event, paramount to any antecedent contract lien which the individual claimants herein may have.

CONCLUSION

In conclusion, then, the appellant reiterates that the trial court erred in each of the foregoing particulars.

The trust deed of June 7, 1930, was, as to the property described as Parcel II, merely an attempted encumbrance of personal property, viz, of a certain leasehold interest of the El Camino Oil Company. It was not, however, executed in the manner required by law for mortgages of personal property. Said instrument was therefore invalid as against the State of California as tax creditor of

said oil company. The district court erred in ordering that the claim of said individual creditors was secured by the lien of said deed of trust as a valid lien, as against the State of California, upon said property described therein as Parcel II.

The penalties which were added to the taxes assessed upon the basis of distributions of motor vehicle fuel by the El Camino Oil Company from April 1, 1930, to June 10, 1930, inclusive, were a lien upon the property of said company. The district court properly so held, but failed to order that said lien attached as of the dates of such distributions (the same as did the lien for the taxes to which said penalties were added), and consequently *prior in time* to the recording of the chattel mortgage and deed of trust relied upon by the individual claimants. The district court erred in failing to specify in its order the date as of which said lien for said penalties attached, and in failing to order that the lien of said penalties was prior and paramount to any lien of said chattel mortgage and trust deed.

Finally, and without regard to the determination made by the court upon the foregoing propositions, the tax lien of the State of California for even that portion of its claim which accrued subsequent in point of time to the recording of said chattel mortgage and deed of trust, is paramount to even valid liens which may have been created by said contractual encumbrances. In other words, even if said deed of trust was *not invalid* as against

the State of California as to the personal property described therein as Parcel II, and even if the lien for the penalties upon the taxes based upon distributions of motor vehicle fuel from April 1, 1930, to June 10, 1930, inclusive, did *not attach* as of the dates of said distributions (the same as did the lien for the tax which was assessed upon the basis of said distributions), still, the *entire* tax lien of the State of California, is superior and paramount to even such *valid* contract liens, even though a portion of said tax lien is *subsequent in point of time* to said contract liens. The legislature of the State of California clearly expressed its intention that the lien for the taxes in question should be paramount to antecedent contract liens. There is no question as to the *power* of the legislature to so provide. It *exercised* this power by adopting language which the California Supreme Court had previously held disclosed the intention to make the tax lien paramount to antecedent contract liens. The district court erred in ordering that that portion of the State's lien which attached *subsequent* to June 10, 1930, was inferior to any lien which the individual creditors may have acquired as against the State by recording said chattel mortgage and deed of trust on that date.

The order of the district court should be modified accordingly. It should be ordered that no portion of the claim of said individual creditors is, as against the State of California, secured by said

deed of trust as upon the property described therein as Parcel II. It should be further ordered that the lien for the penalty which was added to the taxes which were based upon distributions of motor vehicle fuel from April 1, 1930, to June 10, 1930, attached as of the dates of such distributions, and so were *prior in point of time,* and so superior to any lien of the contract creditors. Finally, and ~~that,~~ in any event, it should be ordered that the *entire* tax lien of the State of California is *paramount* to *any* lien of the contract creditors, even if such contract lien be earlier, in point of time, than the tax lien of the State.

Respectfully submitted.

U. S. WEBB,
Attorney General,
By JOHN O. PALSTINE,
Deputy Attorney General,
Attorneys for State of California, Creditor and Appellant.

o

No. 8411

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

14

In the Matter of

JOSEPH H. GRANDE,

Bankrupt.

JOSEPH H. GRANDE,

Appellant,

vs.

ARIZONA WAX PAPER COMPANY and STATE PRODUCE EXCHANGE,

Appellees.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
JOSEPH H. GRANDE,
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Appellant,

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Solicitors.

For Appellant:

JAMES DONOVAN, Esq.,

417 South Hill Street,

Los Angeles, California.

For Appellee:

BENJAMIN W. SHIPMAN, Esq.,

523 West Sixth Street,

Los Angeles, California.

United States of America, ss.

To Arizona Wax Paper Company and State Produce Exchange, and their attorney, Benjamin W. Shipman Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 12 day of November, A. D. 1936, pursuant to an order allowing an appeal filed on October 14, 1936 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause entitled "In the matter of Joseph H. Grande, Bankrupt, In Bankruptcy No. 24154-J" wherein Joseph H. Grande is appellant and you are appellees to show cause, if any there be, why the order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable William P. James United States District Judge for the Southern District of California, this 14 day of October, A. D. 1936, and of the Independence of the United States, the one hundred and sixty-first.

Wm. P. James
U. S. District Judge for the Southern District of California.

Received copy of Citation, Appeal, Order for Appeal, Assignment of Errors and Order allowing Appeal.

Benj. W. Shipman
Attorney for Appellees.

Dated October 15, 1936

[Endorsed]: Filed R S Zimmerman, Clerk at 3 min. past 3 o'clock Oct 16 1936 P. M. By R B Clifton Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)
(In Bankruptcy No. 24154-J
JOSEPH H. GRANDE,) FINDINGS AND ORDER.
(
Bankrupt.)

The trustee herein having filed his original petition for a turn over order as against Hazel D. Grande, the daughter of the bankrupt, Joseph H. Grande, the bankrupt, Daisy Grande, the wife of the Bankrupt, and James Donovan, their attorney, and Grande California, Inc., a California corporation, and the said respondents, and each of them, appearing the day set for the hearing, to-wit, January 31, 1935, and making objection that no evidence should be introduced for the reason that said petition was made on information and belief and not upon the absolute allegation of fact, and said objections, and each of them, having been sustained, and the Court having allowed the trustee to file a new application, to-wit, a new trustee's petition under oath. The allegations of the new petition were verified absolutely and not on information and belief.

The respondents, and each of them, then waived an additional five (5) days notice of the hearing and in the interests of hearing the matter promptly, they being present with their witnesses, entered into the following stipulation in open court. That upon the trustee's new application and the Referee's order to show cause thereon, they waived the five (5) days notice or any additional service thereof other than as made on their counsel in the court; that they waived all notice of time of the hear-

ing and consented that the matter might be heard then and there forthwith. That the court accepted said stipulation and the parties proceeded to trial.

Evidence, oral and documentary, was introduced on behalf of the parties and it was stipulated that the respective answers of Daisy Grande, Joseph H. Grande, Hazel D. Grande and James Donovan theretofore filed as answers to the original trustee's application might stand as the answers to the amended application.

The Court now makes the following

FINDINGS:

William I. Heffron is the duly elected, qualified and acting trustee of the estate of the bankrupt, Joseph H. Grande.

That prior to the formation of the corporation, Grande California, Inc., Joseph H. Grande did business under the name of Grande California. That on or about March 2, 1934, the bankrupt had many and extensive debts, upon which some of his creditors were pressing him for collection by the filing of suits in various counties of California, and one or more creditors had obtained a judgment against him for substantial sums.

That thereupon the bankrupt, Joseph H. Grande, for the purpose of preventing his creditors then existing, from collecting their accounts against him, and also for the purpose of hindering, delaying and defrauding his creditors, assigned, transferred and set over, without consideration, automobiles, cash, merchandise, leases and contracts, to a corporation he then caused to be incorporated, to-wit, the corporation known as Grande California, Inc. That the said corporation was then caused to come into

being and to exist for the sole purpose of permitting the said Joseph H. Grande to do business without being hindered by his creditors, and for the purpose of permitting him to retain possession of his property under the name and in the corporate form afforded by the incorporation of Grande California, Inc. James Donovan was personally not a party to any fraud.

The Court finds that no person invested any money, either as a contribution to capital assets, or otherwise, to Grande California, Inc., either at the time it was incorporated, or at any time since, and that Joseph H. Grande is the owner in fact of said corporation, its corporate stock, and all of its assets.

The Court finds that James Donovan, the attorney for Joseph H. Grande was the attorney employed by Joseph H. Grande to draw the articles of incorporation and the by-laws, and for the purpose of convenience only, two of the shares of stock of Grande California, Inc. were to be issued in the name of James Donovan. The Court finds that it is admitted by James Donovan that he invested no money and contributed nothing to the capital assets of said corporation, *altho* it is claimed by James Donovan that he charged One Hundred ($100.00) Dollars attorney's fees for creation of the corporation, for which he took said two (2) shares of the capital stock. This Court finds that James Donovan is mistaken in the assertion of such claim, and of the fact which he alleges with respect thereto, and finds that James Donovan was paid his attorney's fee in the form of a check which bore the inscription on the voucher portion thereof at the time it was delivered to James Donovan, and at the time that James Donovan endorsed his said check for payment, and

at the time said check was paid to James Donovan, to-wit, the endorsement and notation on the face of said check, "Incorporating Grande California". The Court finds that this check was made payable to James Donovan and was endorsed and cashed by him, and that he received the sum of money shown in said check in payment of his services and not otherwise.

Hazel D. Grande, the daughter of the bankrupt, and Gladys Fritz, have at no time contributed any money to the capital assets of said corporation, nor any money in payment of the stock, and the holding of stock in the names of Hazel D. Grande and James Donovan and/or Gladys Fritz, was for the purpose of the convenience of Joseph H. Grande only and for no other purpose.

The Court finds that the assets of Grande California, Inc., have not been turned over to the trustee and he has not come into the possession thereof at this time. That there are insufficient assets now held by the trustee to pay the debts of the bankrupt.

And from the foregoing facts and the evidence in the case, the Court makes its

CONCLUSIONS.

That the corporation, Grande California, Inc., is the alter ego of Joseph H. Grande, the bankrupt. That the bankrupt, Joseph H. Grande, is the sole owner of all of the capital stock of said corporation, and all of its assets, including its trucks, cash, merchandise, leases and contracts, and personal property of every kind and description, including its book accounts, and that the said property, and all thereof, should have been turned over to the trustee in bankruptcy by the bankrupt at the time that

he was heretofore adjudicated a bankrupt on his own voluntary petition.

THEREFORE, IT IS HEREBY ORDERED that William I. Heffron, trustee in bankruptcy, forthwith take immediate possession of all of the assets of the bankrupt, standing in the name of Grande California, Inc., whether the same exist at Salinas, California, or elsewhere, and use all necessary force so to do.

That Grande California, Inc., is in fact, Joseph H. Grande. That Joseph H. Grande has exercised absolute and complete control and dominion over the said corporation and its assets since the creation of said corporation, Grande California, Inc., on or about the 2nd or 3rd of March, 1934.

IT IS FURTHER ORDERED that said Grande California, Inc., its officers, agents, directors and counsel, including Joseph H. Grande, the bankrupt, Hazel D. Grande, the daughter of the bankrupt, Daisy Grande, the wife of the bankrupt, James Donovan, the attorney for the bankrupt, and Gladys Fritz, the secretary of Grande California, Inc., be and hereby are restrained and enjoined from interfering with the possession, use and occupation of the assets of Grande California, Inc. by the trustee in bankruptcy herein, other than reviewing the orders of this Referee in the manner provided by law, or taking such other legal proceedings herein as may be available to them under the procedure of the Bankruptcy Law.

Dated at Los Angeles, California, this 4th day of February, 1935.

Rupert B. Turnbull
Referee in Bankruptcy

CERTIFICATE OF TRUE COPY

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA } SS.
CENTRAL DIVISION

I, RUPERT B. TURNBULL, Referee in Bankruptcy in and for the County of Los Angeles, State of California, in and for the said district, do hereby certify that the foregoing is a true and correct copy of "FINDINGS AND ORDER" in the above entitled matter as the same appears of record in the proceedings in said matter now on file in my office.

In WITNESS WHEREOF, I have hereunto set my hand this 6th day of February, 1935.

Rupert B Turnbull
Referee in Bankruptcy

[Endorsed]: Filed 10 A. M. Feb. 25, 1935 R. S. Zimmerman, Clerk. By Murray E. Wire Deputy Clerk.

[Title of Court and Cause.]

MOTION AND ORDER TO SHOW CAUSE

Comes now your petitioner, Joseph H. Grande, by his attorney, James Donovan, and prays for an order to Show Cause why the Referee, Rupert B. Turnbull, should not certify to this Court a transcript of his proceedings in support of the Findings made in said cause and the grounds of appeal therefrom to this Court, as hereinafter set forth in this petition.

That the Findings and Order made by said referee, Rupert H. Turnbull, and certified to on the 4th of February, 1935, were served upon James Donovan, attorney for Joseph H. Grande, bankrupt, either on the afternoon of the 4th of February, or the early morning of February 5th.

That an order to Show Cause on Trustee's Petition for Summary Order was issued on the 25th of January, 1935, to be heard on the 31st day of January, 1935, at ten o'clock, A. M., based upon an affidavit of the sworn statement of the trustee, William I. Heffron, on information and belief.

That said Order to Show Cause was served upon the following named persons: Joseph H. Grande, bankrupt, Daisy Grande, his wife, Hazel Grande, his daughter, James Donovan, his attorney and Gladys Fritz, secretary of the Grande-California, Incorporated, all of whom filed answers to said Order to Show Cause and appeared on the 31st day of January in the Court of Rupert B. Turnbull. Prior to the day set for said hearing Joseph H. Grande, bankrupt, his wife and his daughter, were interrogated concerning his personal property and assets they had

accumulated and transferred during the thirty-six years of their married life, all of which was objected to by your petitioner upon the grounds that the same was not material, irrelevant, and would not in anywise disclose any assets or liabilities covering the period during which the creditors' claims existed; and upon the hearing on said 31st day of January, 1935, all of the testimony heretofore taken was offered in evidence in bulk by Counsel for the trustee, all of which was objected to by the attorney for the bankrupt, then withdrawn by the attorney for the trustee and only one or two excerpts of said testimony was offered; thereupon these offers of excerpts were again withdrawn by counsel for the trustee; then, a renewed *effort* was made of all the testimony that had been taken at the prior hearings, which was again objected to. All of the persons who were served with the Order to Show Cause for a Summary Order in behalf of the Trustee, were called and testified, except the Secretary of Grande-California, Incorporated. Thereupon, the Referee announced that James Donovan, representing the bankrupt, should file a brief by Monday afternoon, February 4th.

That James Donovan, attorney for your petitioner, spent the 1st, 2nd and 3rd of February preparing a brief and delivered to the Clerk of said Court, Monday noon, a brief and mailed a copy of the same, Sunday evening, to Mr. Shipman, attorney for the trustee.

That upon delivering the brief to the Clerk of the Referee, he confirmed what the Court had stated on the Friday before, that no further hearing in this matter would be heard before the 15th of March, for the reason that the Court was making a trip to the Hawaii Islands.

Counsel for the trustee announced that he desired to make further examination of Daisy Grande and that the matter of the hearing was not opposed.

That since James Donovan, attorney for the bankrupt, received the Findings or Order of the Referee, not having the rules of procedure in bankruptcy matters in his office, only having the United States Compiled Statutes, Annotated, he sent a young law student from his office to the Law Library to find out how much time he had in which to except to and appeal from the Findings and Order of the Referee. He brought back the information that under the rule, attorney for the bankrupt was entitled to twenty days, which would give him until the 24th or 25th of February in which to prepare his exceptions to the ruling of the Referee and have him certify same to the Judge of the District Court.

On the 19th of February, 1935, your petitioner received a letter from Mr. Shipman, attorney for the trustee, in which he wrote me, as follows: "The Order of the Court having become final, all of the assets and property in the corporation should be turned over to the trustee." James Donovan, attorney for your petitioner, immediately began investigation of the time in which he should have presented his application under general order XXVIII, but he found nowhere in the text the time limit in which to take an appeal on further order. He discovered in the local Court rule 84, that he should have filed with the Referee a petition for a review of the Order made by the Referee, within ten days from the service of the Findings upon him. He has examined a few decisions under this rule and finds that this being a rule established by the Court, its construction of the rule gives it the full force and effect of a statutory enactment; however, believing

that it is within the judicial discretion of the Court making the rules to relieve one of an error of this character, he should be relieved from this default and be granted an opportunity to have a review of the Findings and Order of the Referee, and the time be extended in which to prepare his exceptions to Findings of the Referee, on the following grounds:

I. That the Referee who heard the case is the only person who can certify the same to the Court.

II. That the Referee left his office on or about the 5th or 6th of February, 1935, and if attorney for your petitioner had prepared his application within the ten days, he would not be here to certify it to this Court as he would not return until about the 15th of March, 1935.

III. That the attorney for the trustee announced that there would be a further hearing of the evidence of Mrs. Daisy Grande upon the return of the Referee.

IV. That no hardship, or inconvenience will inure or interfere with the rights of the trustee by the delay until the Referee returns, at which time he can certify the record to this Court.

V. There is a direct charge of fraud against the bankrupt, Joseph H. Grande, and an implication of a participation and direction of the acts of the bankrupt by James Donovan, his counsel, in the incorporating of Grande-California, Incorporated.

VI. That while the rules made by the United States District Court, governing bankruptcy procedure, have the

same dignity and force as though they were statutory enactments, yet the rules, so made by the court, can be changed, or modified, or the Court can exercise its judicial discretion to relieve either an attorney or a litigant from an embarrassment such as is indicated in this petition, when it can work no hardship to the adverse party.

Upon the foregoing grounds your petitioner respectfully prays that an Order to Show Cause issue why the petitioner should not be granted extension of time in which to present to the Referee his petition for a review of the ruling of the Referee.

Respectfully submitted by Joseph H. Grande, by his attorney, James Donovan.

James Donovan

Upon the 21st day of February, 1935 the petition of Joseph H. Grande, bankrupt, to Show Cause why he should not be granted the time in which to file a petition before the Referee in the above entitled matter, to have the same reviewed by this Court, it is therefore, ordered that Notice be given to the trustee, or his attorney of record, to appear on Monday, the 25th day of February, before this Court, to show cause, if any he has, why this petition should not be granted.

Wm. P. James

Judge.

February 21, 1935.

Upon application of James Donovan, attorney for the above named bankrupt, to shorten time in which to serve copy of the petition and order to show cause upon the counsel for the trustee, it is hereby ordered that instead of serving the same upon counsel for the trustee five days before the date of said hearing that the time be shortened in which to serve said order to show cause and petition to four days, so that the same may be heard on the 25th day of February, 1935, at 10 o'clock, a. m. before this Court.

Wm. P. James

Judge

February 21, 1935.

[Endorsed]: Received copy of within Motion and Order to Show Cause this 21st day of Feb. 1935 Benjamin W. Shipman, Atty for Trustee. Filed R. S. Zimmerman Clerk at 53 min. past 10 o'clock Feb. 23, 1935 A. M. By F. Betz, Deputy Clerk.

[Title of Court and Cause.]

OPINION AND ORDER ON PETITION OF BANKRUPT FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW OF REFEREE'S ORDER

It appears that the referee in bankruptcy, after due hearing on order to show cause, entered his decision on February 4, 1935, directing the bankrupt to turn over to the trustee all property held by Grande California, Inc., as being property of the bankrupt's estate. Notice of this decision was given to counsel for the bankrupt and no proceedings were taken by the latter for ten days thereafter, at the expiration of which time, under the provisions of Rule 84 of this court no review proceeding could be instituted to bring the matter to the District Court. The rule referred to provides that petition for review of any order made by the referee shall be filed with the referee within ten days after the date of notice of the order. The rule further provides "for good cause showing, the referee may at any time within said period of ten days, extend the time an additional thirty days within which a petition for review may be filed." Counsel for the bankrupt did not discover this provision limiting the period to file his petition for review until after the ten days had expired. He has now presented a motion asking to be relieved of the default and be permitted to have the order reviewed. The counter showing made by the trustee quite clearly shows that the hearing was duly had as to the matter determined and that due notice of the decision was given to counsel for the bankrupt. Counsel for the bankrupt admits that the rules of court have the effect

of statutes, and this is clearly held by the decisions. The Supreme Court of the United States has said that the Federal courts have inherent power to make rules governing the practice so long as they are not in conflict with express statutes. "The general rule undoubtedly is that courts of justice possess the inherent power to make and frame reasonable rules not conflicting with express statute." In re Hien, 166 U. S. 432. A court rule limiting the time within which to file a petition for review is binding. In re David, 33 Fed. (2d) 740; Patents Process, Inc. v. Durst, 69 Fed. (2d) 283. It is nevertheless held that it is "in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it." U. S. v. Gottlieb Breitling, 61 U. S. 252. It is generally held that ignorance of counsel of the provisions of a rule of court is not sufficient to authorize vacation of judgments or orders. This because counsel is presumed to be acquainted with such rules. California Juris., (See Vol. 14, Sec. 99).

Considering the merits of the case, it is not made to appear that injustice will result to the bankrupt by the enforcement of the order. There seemed to have been no conflict as to the fact that the Grande California, Inc. was a mere vehicle used by the bankrupt for the conducting of business. Where such is the case, and as is apparent here, bankrupt was the mere alter ego of the corporate organization. He owned all of the stock, except perhaps some qualifying shares, and was, in fact, necessarily the owner in turn of all of the corporate property. While the particular matter was not made the subject of contest, in Patents Process, Inc. v. Durst, (supra), the opinion opens with the expression that "Patents Process,

Inc., a corporation, is the alter ego of Frank D. Williams. Bankruptcy proceedings were filed against both and the proceedings were consolidated."

Counsel for the bankrupt, who is a reputable practitioner at this bar, seems to be of the opinion that there is some reflection cast upon him by reason of the terms of the order of the referee, because that counsel was employed to organize the corporation in question. I am not of the view that counsel should make any such assumption because of his having performed the duties of an attorney in organizing the corporation a considerable time before the bankrupt filed his voluntary petition. So far as this court is concerned, counsel need have no apprehension that any view will be taken which will cast discredit upon his professional integrity.

I am of the view: (1) That the showing as to the mistake of counsel is not sufficient to justify the making of the order here sought; (2d) Assuming that the omission to act was excusable, the facts as presented touching the propriety of the order made by the referee are insufficient to support a substantial claim for error.

For the reasons stated, the petition of the bankrupt will be denied, and it is so ordered. An exception is noted.

Dated February 27, 1935.

Wm. P. James
U. S. District Judge.

[Endorsed]: Filed R. S. Zimmerman Clerk at 54 min. past 2 o'clock Feb. 27, 1935 P. M. By Murray E. Wire, Deputy Clerk.

[Title of Court and Cause.]

REFEREE'S CERTIFICATE OF COMPLIANCE

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

I, RUPERT B. TURNBULL, Referee in Bankruptcy, to whom the above entitled proceeding has been referred, do hereby certify that the above named Bankrupt was on the 10th day of October, 1934, adjudged Bankrupt; that so far as appears from the records and files of my office and matters coming to my attention said Bankrupt has complied with all the orders of the Court and the requirements of the Bankruptcy Act and has committed none of the offenses and done none of the things prohibited by said act.

Dated: September 23, 1935

Rupert B Turnbull
Referee in Bankruptcy

[Endorsed]: Filed R. S. Zimmerman Clerk at 20 min. past 3 o'clock Sep. 26, 1935 P. M. By F. Betz, Deputy Clerk.

[Title of Court and Cause.]

BANKRUPT'S PETITION FOR DISCHARGE AND ORDER THEREON

To the Honorable Judge of the District Court of the United States, For the Southern District of California—Central Division

Joseph H. Grande (Name of Bankrupt) of Alhambra (City)

in the County of Los Angeles and State of California in said District, respectfully represents:

That on the 10th day of October last past, he was duly adjudged bankrupt under the Acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said Acts and of the orders of the Court touching said bankruptcy.

WHEREFORE he PRAYS that he may be decreed by the Court to have a full discharge from all debts provable against his estate under said Bankruptcy Act, except such debts as are excepted by law from such discharge.

Dated this 8th day of October A. D., 1935

Joseph H. Grande
Bankrupt.

ORDER OF NOTICE THEREON

United States of America,
Southern District of California ss.

On this 9th day of October A. D., 1935, on reading the foregoing petition, it is

ORDERED BY THE COURT, that a hearing be had upon the same on the 2nd day of December A. D., 1935 before said Court, IN THE FEDERAL BUILDING, at Los Angeles in said District at 10 o'clock in the forenoon; and that notice thereof be published in THE LOS

ANGELES DAILY JOURNAL, a newspaper printed in said District, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of said petitioner should not be granted.

AND IT IS FURTHER ORDERED BY THE COURT, that the Referee shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

WITNESS the Honorable Wm P James Judge of said Court and the seal thereof, at Los Angeles in said District, on the 9th day of October A. D., 1935

[Seal of the Court]

R. S. ZIMMERMAN, Clerk.
By L Wayne Thomas
L. Wayne Thomas
Deputy Clerk.

James Donovan Esq
Address 940 Subway Terminal Bldg.
Los Angeles, Calif
Attorney for Said Bankrupt.

Referee Turnbull
Number of copies of notice for Referee 70

NOTE

Any creditor objecting to the discharge of the above bankrupt must file specifications of the grounds of his objections in writing with the Clerk of the U. S. District Court at or before the time of hearing said matter as an extension of time may not be allowed for that purpose. U. S. Supreme Court form No. 58 has been prescribed for such specifications.

[Endorsed]: Filed R. S. Zimmerman Clerk at 53 Min past 2 o'clock Oct. 9, 1935 P. M. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

AFFIDAVIT OF PUBLICATION.

In the matter of JOSEPH H. GRANDE, In Bankruptcy

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

G. Artz, of said County and State, being duly sworn, says:

That I am and at all times herein mentioned was a citizen of the United States, over eighteen years of age, and not a party nor interested in the above entitled matter; that I am the principal clerk of the printer, publisher and proprietor of the LOS ANGELES DAILY JOURNAL, a newspaper printed and published daily (Sundays excepted), in the said Los Angeles County; that the BANKRUPT'S PETITION FOR DISCHARGE AND ORDER THEREON, in the above entitled matter, of which the annexed is a printed copy, was published in said newspaper October 10th, 1935

G Artz

Subscribed and sworn to before me, this 10th day of October, 1935.

Wm W Roe
Notary Public in and for Los Angeles County,
State of California.

[Endorsed]: Filed R. S. Zimmerman Clerk at 55 min. past 1 o'clock Oct. 23, 1935 P. M By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

SPECIFICATIONS OF GROUNDS OF OPPOSITION TO BANKRUPT'S DISCHARGE

Arizona Wax Paper Co., a co-partnership, with its principal place of business at Salinas, California, a creditor of said Joseph H. Grande, a bankrupt, does hereby object to the granting to him of the discharge from his debts and, for the grounds of such opposition, does file the following specifications:

That, within eleven (11) months immediately preceding the filing of the petition herein by the said bankrupt, said bankrupt transferred and concealed his property, with the intent to hinder, delay and defraud his creditors. That such transfer and concealment was accomplished by the bankrupt by the transfer of his assets to a corporation under the name of Grande California, Inc., and was so transferred within said period for the purpose of defrauding his then existing creditors. That, at said time, this objecting creditor was a creditor of said Joseph H. Grande. That said Joseph H. Grande has turned over to said corporation more than one dollar ($1.00) in cash, and various other assets.

That, on or about the 4th day of February, 1935, a turn-over order was made by the Hon. Rupert B. Turnbull, Referee in Bankruptcy, a certified copy of which order is hereto attached, marked "Exhibit A", and, by reference, made a part hereof, and, in said proceeding, it was held and determined that said Joseph H. Grande, the bankrupt herein, for the purpose of preventing his then existing creditors from collecting their accounts against him and also for the purpose of hindering, delaying and

defrauding his creditors, assigned, transferred and set over, without consideration, automobiles, cash, merchandise, leases and contracts to said corporation for the purpose as aforesaid. That said order and findings of the referee in bankruptcy have become final and have not been revised, modified or in any wise changed. That said bankrupt knowingly and fraudulently omitted the property turned over to the corporation, and in existence at the time of bankruptcy, from his schedule of assets herein, and failed to reveal to said trustee the existence of the same or the facts as to the title of said corporation to said property, and fraudulently and knowingly concealed the said facts from said trustee, and, on the contrary, maintained that he had but a small stock interest in said corporation, while, in truth and in fact, said corporation belonged wholly to said bankrupt, was controlled and dominated by him, and was his alter ego. That said corporation had no permit to issue stock at any time before October 10, 1934.

That, within four (4) months of the bankruptcy, said bankrupt transferred property and assets to his wife, consisting principally of moneys of the value of more than one dollar ($1.00) for the purpose of defrauding his then existing creditors. That the creditor appearing herein in opposition to the bankrupt's petition for discharge was a creditor at the time of such transfers and concealments.

Said bankrupt at a time subsequent to the first day of the four (4) months immediately preceding the filing of the bankruptcy petition herein, to-wit, during the month of September, 1934, and prior to the 10th day of October, 1934, with intent of delaying and defrauding his creditors, transferred, removed and concealed, and permitted to be removed and concealed, a portion of his property,

to-wit, cash in bank and on hand, and that he transferred the same to Daisy Grande, his wife, and concealed his title thereto in said Daisy Grande's name.

That, within said four (4) months, upon numerous occasions, said bankrupt caused to be made payments of amounts of more than one dollar ($1.00) each on account of purchases of automobiles, real and personal property in the name of Daisy Grande, his wife, for the purpose of concealing his title thereto in the name of said Daisy Grande.

That, within said four (4) months, upon numerous occasions, said bankrupt caused to be made payments of amounts of more than one dollar ($1.00) each on account of purchases of real property, in the name of Hazel D. Grande, his daughter, for the purpose of concealing his title thereto in the name of said Hazel D. Grande.

That the Arizona Wax Paper Co., a co-partnership, appearing herein, is a creditor of said Joseph H. Grande, and has filed a claim, as such creditor, in the instant bankruptcy proceeding.

WHEREFORE, said Arizona Wax Paper Co., a co-partnership, prays the Court to deny said bankrupt's petition for discharge.

ARIZONA WAX PAPER CO.

By T. G. Emmons

Objecting Creditor

Benj. W. Shipman

Attorney for said Objecting Creditor

STATE OF CALIFORNIA)
) ss.
County of Monterey)

On this 1st day of December in the year one thousand nine hundred and Thirty Five before me, F C Johansen a Notary Public in and for the County of Monterey, State of California, residing therein, duly commissioned and sworn, personally appeared T G Emmons Co-Partner of Arizona Wax Paper Co. known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of Monterey the day and year in this certificate first above written

[Seal] F. C. Johansen

Notary Public in and for the County of Monterey, State of California

My commission expires Jany. 14, 1938

[For Exhibit "A" See Order of 2/4/35 Heretofore Printed.]

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA) ss
CENTRAL DIVISION)

BENJ. W. SHIPMAN, first by me being duly sworn, deposes and says: that he is attorney in the within matter for the objecting creditor, Arizona Wax Paper Co.; that he has prepared the specifications of grounds of opposition to the bankrupt's discharge; that the co-partners constituting the Arizona Wax Paper Co. are not within the County of Los Angeles and, for that reason, the affiant executes this verification; that the matters set forth therein appertaining to a turn-over order are true of affiant's own knowledge and, as to the other matters of opposition therein set forth, affiant believes them to be true.

Benj. W. Shipman

Subscribed and sworn to before me this 2nd day of December, 1935.

[Seal] Ione Virden

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires January 26, 1937

[Endorsed]: Filed 10 A. M. Dec. 2, 1935 R. S. Zimmerman Clerk By Murray E. Wire, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

SPECIFICATIONS OF GROUNDS OF OPPOSITION TO BANKRUPT'S DISCHARGE.

Sun State Produce Exchange, a corporation, with its principal place of business in San Francisco, California, and doing business in the County of Imperial, State of California, a party interested in the Estate of Joseph H. Grande, a bankrupt, does hereby object to the granting to him of the discharge from his debts and, for the grounds of such opposition, does file the following specifications:

That, within eleven (11) months immediately preceding the filing of the petition herein by the said bankrupt, said bankrupt transferred and concealed his property, with the intent to hinder, delay and defraud his creditors. That such transfer and concealment was accomplished by the bankrupt by the transfer of his assets to a corporation under the name of Grande California, Inc., and was so transferred within said period for the purpose of defrauding his then existing creditors. That, at said time, this objecting creditor was a creditor of said Joseph H. Grande. That said Joseph H. Grande has turned over to said corporation more than one dollar ($1.00) in cash, and various other assets.

That, on or about the 4th day of February, 1935, a turn-over order was made by the Hon. Rupert B. Turnbull, Referee in Bankruptcy, a certified copy of which order is hereto attached, marked "Exhibit A" and, by reference, made a part hereof, and, in said proceeding, it was held and determined that said Joseph H. Grande, the bankrupt herein, for the purpose of preventing his then existing creditors from collecting their accounts

against him and also for the purpose of hindering, delaying and defrauding his creditors, assigned, transferred and set over, without consideration, automobiles, cash, merchandise, leases and contracts to said corporation for the purpose as aforesaid. That said order and findings of the referee in bankruptcy have become final and have not been revised, modified or in any wise changed. That said bankrupt knowingly and fraudulently omitted the property turned over to the corporation, and in existence at the time of bankruptcy, from his schedule of assets herein, and failed to reveal to said trustee the existence of the same or the facts as to the title of said corporation to said property, and fraudulently and knowingly concealed the said facts from said trustee, and, on the contrary, maintained that he had but a small stock interest in said corporation, while, in truth and in fact, said corporation belonged wholly to said bankrupt, was controlled and dominated by him, and was his alter ego. That said corporation had no permit to issue stock at any time before October 10, 1934.

That, within four (4) months of the bankruptcy, said bankrupt transferred property and assets to his wife, consisting principally of moneys of the value of more than one dollar ($1.00) for the purpose of defrauding his then existing creditors. That the creditor appearing herein in opposition to the bankrupt's petition for discharge was a creditor at the time of such transfers and concealments.

Said bankrupt at a time subsequent to the first day of the four (4) months immediately preceding the filing of the bankruptcy petition herein, to-wit, during the month of September, 1934, and prior to the 10th day of October, 1934, with intent of delaying and defrauding his creditors, transferred, removed and concealed, and permitted to be

removed and concealed, a portion of his property, to-wit, cash in bank and on hand, and that he transferred the same to Daisy Grande, his wife, and concealed his title thereto in said Daisy Grande's name.

That, within said four (4) months, upon numerous occasions, said bankrupt caused to be made payments of amounts of more than one dollar ($1.00) each on account of purchases of automobiles, real and personal property in the name of Daisy Grande, his wife, for the purpose of concealing his title thereto in the name of said Daisy Grande.

That, within said four (4) months, upon numerous occasions, said bankrupt caused to be made payments of amounts of more than one dollar ($1.00) each on account of purchases of real property, in the name of Hazel D. Grande, his daughter, for the purpose of concealing his title thereto in the name of said Hazel D. Grande.

That the Sun State Produce Exchange, a corporation, appearing herein, is a creditor of said Joseph H. Grande, and has filed a claim, as such creditor, in the instant bankruptcy proceeding.

WHEREFORE, said Sun State Produce Exchange, a corporation, prays the Court to deny said bankrupt's petition for discharge.

SUN STATE PRODUCE EXCHANGE,
By J. W. Asher
Objecting creditor.

Benj. W. Shipman
Attorney for Objecting Creditor

[For Exhibit "A" Attached Hereto, See Order of Referee Dated Feb. 4, 1935, Heretofore Printed.]

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA) ss.
SOUTHERN DIVISION)

J. W. Asher being by me first duly sworn, deposes and says: that he is the managing agent of Sun State Produce Exchange, a corporation, in the above entitled action; that he has read the foregoing specifications of grounds of opposition to Bankrupt's Discharge, Joseph H. Grande, Bankruptcy and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That affiant makes this verification for the reason that the facts are within his knowledge and that no officer of the corporation is present within the jurisdiction of this court.

J. W. Asher

Subscribed and sworn to before me this 30th day of November, 1935.

[Seal] Russie W. Shaw
Notary Public in and for the County of Imperial, State of California.

[Endorsed]: Filed Dec 2 1935 R. S. Zimmerman, Clerk By Murray E. Wire, Deputy Clerk

ORDER REFERRING OBJECTIONS TO SPECIAL MASTER

At a stated term, to-wit: The September Term A. D. 1935 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court room thereof, in the City of Los Angeles on Monday the 2nd day of December in the year of our Lord one thousand nine hundred and thirty five: Present: The Honorable William P. James, District Judge

In the Matter of	)	
	)	
JOSEPH H. GRANDE	)	No. 24154-J Bkcy
	)	
Bankrupt.	)	

This matter coming before the Court for hearing on the Bankrupt's Petition for discharge; Benjamin W. Shipman, Esq. appearing for the Arizona Wax Paper Co., objecting Creditor, presents in writing appearance in opposition to discharge, and Specifications of objections to discharge, which are filed herein, and the Court orders the matter referred to the Referee herein as Special Master for hearing and report to the Court on said objections.

Later, at the hour of 4.30 o'clock p. m., appearance of the Sun State Produce Exchange, objecting Creditor, by his attorney, B. W. Shipman, and the Specifications of objections to discharge are presented for filing herein, the Court orders same filed and orders same referred to the Referee, as Special Master, for hearing and report to the Court on said objections.

[Title of Court and Cause.]

REPORT OF REFEREE AS SPECIAL MASTER ON CREDITORS' OBJECTIONS TO BANKRUPT'S PETITION FOR DISCHARGE

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The Above entitled proceedings were referred to Hugh L. Dickson, Referee in Bankruptcy, as Special Master, by order of the United States District Court, dated December 2nd, 1935, to hear the issues raised by the bankrupt's petition for discharge, and the objections thereto filed by Sun State Produce Exchange, creditor of said bankrupt.

Thereupon the matter came up regularly for hearing before the Special Master, on the 5th day of March, 1936; was continued from time to time, which continuance was agreed to by counsel representing the objecting creditor and counsel representing the bankrupt, and was thereafter concluded on the 15th day of July, 1936; there appearing at said hearing, and in all matters appertaining thereto on behalf of said creditor, Benjamin W. Shipman, Esq., and there appearing on behalf of said bankrupt, James Donovan, Esq.

A trial was had of the issues raised by the bankrupt's petition for discharge and the objections thereto filed by the objecting creditor, the allegations contained in said specification of grounds of opposition to bankrupt's discharge being deemed denied;

Evidence, both oral and documentary, was presented and submitted to the Special Master; the evidence being closed, the cause was submitted to the Special Master for his report, findings and determination. The Referee, as such Special Master, reports as follows:

CHARACTER OF ISSUES

Upon the hearing, the objection urged to the discharge of the bankrupt, in accordance with his petition, was the objection based upon Sec. 14-b (4) of the Bankruptcy Act; namely, that the bankrupt had at any time subsequent to the first day of the twelfth month immediately preceding the filing of the petition, transferred, removed, destroyed or concealed or permitted to be transferred, removed, destroyed or concealed any of his property, with intent to hinder, delay or defraud his creditors.

The Special Master, upon the evidence adduced, finds as follows:

FINDINGS OF FACT

The objecting creditor is a creditor of the bankrupt, and, until 1933, existed as a California corporation, organized and existing under the laws of the State of California. In October of 1933, said corporation filed a Certificate of Dissolution in the office of the Secretary of State of the State of California. The indebtedness represented by the claim filed was incurred by the bankrupt before the dissolution of the corporate existence of the objecting creditor, and, prior to such dissolution, said objecting creditor secured a judgment against said bankrupt which has not been satisfied. Said objecting credi-

tor filed its claim, based upon said judgment, in the bankruptcy proceedings herein.

That, in the course of the bankruptcy proceedings herein, the Trustee in Bankruptcy did file a petition or application directed among others against the bankrupt herein for a turn-over order, claiming that a corporation known as Grande-California, Inc. was, in truth and in fact, the alter ego of the bankrupt; that the assets owned by said corporation were the assets of the bankrupt, transferred by said bankrupt to said corporation. That said bankrupt was present during all of the proceedings and hearings had upon the application for a turn-over order aforesaid; that such proceedings were had in connection with said application or petition that, on or about the 4th day of February, 1935, findings and order were made and entered, which findings and order have become final, and to which proceedings the bankrupt was a party, as aforesaid. It was found that, within eleven months prior to the filing of the voluntary petition in bankruptcy, the bankrupt herein transferred, assigned and set over, without consideration, automobiles, cash, merchandise, leases and contracts, to said corporation, Grande-California, Inc. That, at said time, said bankrupt had many and extensive debts and at least one judgment against him. That said transfer by said Joseph H. Grande, the bankrupt, to said corporation of his assets was for the purpose of preventing his then existing creditors from collecting their accounts against him, and also for the purpose of hindering, delaying and defrauding his creditors.

It was further found in said proceedings, in which said findings and order have become final, that said corporation, to-wit: Grande California, Inc., was caused to come into being and to exist for the sole purpose of permitting

the said bankrupt to do business without being hindered by his creditors, and for the purpose of permitting him to retain possession of his property under the name and in the corporate form, and that no other person invested any money in said corporation, either as a contribution to capital assets, or otherwise, either at the time it was incorporated, or at any time prior to the 4th day of February, 1935, and that said Joseph H. Grande was, in fact, the owner of said corporation, its corporate stock and all of its assets.

It was further the conclusion of the court from the facts and the evidence that said Grande California, Inc., was the alter ego of Joseph H. Grande, the bankrupt, and that all of the property of said corporation should have been turned over to the Trustee in Bankruptcy by the bankrupt at the time of his adjudication. That the bankrupt did not turn over said assets at the time of the filing of the petition herein.

That the aforesaid findings and order were introduced in evidence, together with the file appertaining to the above entitled case. That the aforesaid findings and order, dated February 4th, 1935, are a part of the file and proceedings had in the above entitled bankruptcy proceedings. That said bankrupt was served with a copy of said findings and order, and thereupon made an application to be relieved of default arising upon the claim that a review of the findings and order of the Referee upon the turn-over proceedings could be filed within thirty days instead of ten days from the date of notice of such order.

That such application or petition to be so relieved was heard and considered by the Court and denied, and no appeal has been taken from this order, or any other proceeding herein had, and said findings and order of February 4th, 1935, have become and now are final.

That the bankrupt herein filed his petition in bankruptcy and was adjudged a bankrupt on the 10th day of October, 1934; that, on the 9th day of October, 1934, said bankrupt gave and transferred to his wife the sum of $1395.00, and, on the 10th day of October, 1934, the day upon which his petition was filed, and he was adjudicated a bankrupt, he gave to his wife the sum of $750.00. That said bankrupt, when questioned regarding these transfers to his wife, upon the dates aforesaid, gave no explanation of his act or acts and claimed that he did not remember the occurrence. (Tr. January 25th, 1935, p 2-3-4) That within eleven months prior to the filing of the petition in bankruptcy aforesaid, said bankrupt transferred to said Grande California, Inc a corporation, wholly owned by said bankrupt, assets consisting of interest in contracts and trucks, also transferred supplies and merchandise to said corporation, and that such transfers were made to a corporation wholly owned by him, a corporation adjudicated by said order of February 4th, 1935, to be the alter ego of said bankrupt. That, at the time of such transfer, he had creditors, had many and extensive debts; that many of his creditors were pressing him for collection thereof, and that the assets transfered by said bankrupt to said corporation, Grande-California,

Inc., were necessary for the payment of his debts, and such transfers were made to hinder his creditors.

The testimony of the bankrupt throughout the proceedings showed an entire lack of good faith and desire on the part of the bankrupt to tell the truth about his financial affairs. For exam*pe*, on page 90 of the transcript, when asked:

"Q. What was your income in 1931?

A. I don't know."

and on page 110 of said transcript, at line 22:

"Q. How much did you make in 1931?

A. Well, I could not exactly say.

Q. Well, approximately.

A. I must have made fifteen or twenty thousand dollars.

Q. In 1931?

A. I think so."

And the record is replete with instances of similar kind.

CONCLUSIONS OF LAW

From the foregoing statement of facts and testimony adduced at the trial, the Special Master finds that said Sun State Produce Exchange is a dissolved California corporation; that the debt, however, owing by the bankrupt to said corporation is a judgment secured by said corporation prior to its dissolution, and prior to the filing of the petition by said bankrupt herein. That, according to the provisions of Sec. 399 of the Civil Code of the State of California, a dissolved corporation can

proceed in the corporate name for the purpose of collecting all debts and obligations due it, and that, by the express provisions of said section, the corporation continues to exist for the purpose of winding up its affairs, prosecuting actions by or against it, enabling it to collect and discharge obligations, dispose of and convey its property, collect and divide its assets and for the purpose of continuing business as far as necessary for winding up thereof. That said objecting creditor is a creditor of said bankrupt, was a creditor at the time of the filing of said petition, and can maintain and present the objections in the instant proceeding to the bankrupt's discharge.

The Special Master further finds that the Order of February 4th, 1935, is a final order; that, by said order, it has been found and adjudged and decreed that said Joseph H. Grande, the bankrupt herein, for the purpose of preventing his creditors then existing from collecting their accounts against him, and also for the purpose of hindering and delaying and defrauding his creditors, assigned, transferred and set over, without consideration, automobiles, cash and merchandise, leases and contracts to a corporation known as Grande California, Inc. That such acts took place within the period specified by Paragraph 14-b (4) of the bankruptcy Act. That the bankrupt, within a time the first day of which was subsequent to the first day of twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed and concealed his property with the intent to hinder, delay and defraud his creditors.

FURTHER, as to the objections to the discharge of the bankrupt herein, filed by Arizona Wax Paper Co., a co-partnership, the Special Master reports as follows:

CHARACTER OF ISSUES

Upon the hearing, the objection urged to the discharge of the bankrupt, in accordance with his petition, was the objection based upon Sec. 14-b (4) of the Bankruptcy Act; namely, that the bankrupt had at any time subsequent to the first day of the twelfth month immediately preceding the filing of the petition, transferred, removed, destroyed or concealed or permitted to be transferred, removed, destroyed or concealed any of his property, with intent to hinder, delay or defraud his creditors.

The Special Master, upon the evidence adduced, finds as follows:

FINDINGS OF FACT

At the time of the trial of the objections presented by said objecting creditor, Arizona Wax Paper Company, the bankrupt denied that said objecting creditor was a creditor of the bankrupt, claiming that said Arizona Wax Paper Company, a co-partnership, was a creditor of persons other than the bankrupt. The Special Master finds, however, that the testimony by the bankrupt is untrue; that the bankrupt, prior to bankruptcy, evidenced the debt by a promissory note, and also acknowledged the indebtedness in writing, declaring it to be his debt in a letter written to one of the members of said co-partnership. That, at the time the cause first came to hearing, there was claimed by the bankrupt that T. G. Emmons and Chas.

E. Goetz, doing business as Arizona Wax Paper Company, had at no time filed a Certificate of Doing Business as co-partners under a fictitious firm name, but the Court finds that the certificate was filed in the County of Imperial, State of California, and that publication thereof was made in accordance with the laws of the State of California, all prior to the filing of the petition in bankruptcy herein.

That, in the course of the bankruptcy proceedings herein, the Trustee in Bankruptcy did file a petition or application directed among others against the bankrupt herein for a turn-over order, claiming that a corporation known as Grande-California, Inc., was, in truth and in fact, the alter ego of the bankrupt; that the assets owned by said corporation were the assets of the bankrupt, transferred by said bankrupt to said corporation. That said bankrupt was present during all of the proceedings and hearings had upon the application for a turn-over order aforesaid; that such proceedings were had in connection with said application or petition that, on or about the 4th day of February, 1935, findings and order were made and entered, which findings and order have become final, and to which proceedings the bankrupt was a party, as aforesaid. It was found that, within eleven months prior to the filing of the voluntary petition in bankruptcy, the bankrupt herein transferred, assigned and set over, without consideration, automobiles, cash, merchandise, leases and contracts, to said corporation, Grande California, Inc. That, at said time, said bankrupt had many and extensive debts and at least one judgment against him. That said transfer by said Joseph H. Grande, the bankrupt, to said corporation of his assets was for the

purpose of preventing his then existing creditors from collecting their accounts against him, and also for the purpose of hindering, delaying and defrauding his creditors.

It was further found in said proceedings, in which said findings and order have become final, that said corporation, to-wit: Grande California, Inc., was caused to come into being and to exist for the sole purpose of permitting the said bankrupt to do business without being hindered by his creditors, and for the purpose of permitting him to retain possession of his property under the name and in the corporate form, and that no other person invested any money in said corporation, either as a contribution to capital assets, or otherwise, either at the time it was incorporated, or at any time prior to the 4th day of February, 1935, and that said Joseph H. Grande was, in fact, the owner of said corporation, its corporate stock and all of its assets.

It was further the conclusion of the court from the facts and the evidence that said Grande California, Inc. was the alter ego of Joseph H Grande, the bankrupt, and that all of the property of said corporation should have been turned over to the Trustee in Bankruptcy by the bankrupt at the time of his adjudication. That the bankrupt did not turn over said assets at the time of the filing of the petition herein.

That the aforesaid findings and order were introduced in evidence, together with the file appertaining to the

above entitled case. That the aforesaid findings and order, dated February 4th, 1935, are a part of the file and proceedings had in the above entitled bankruptcy proceedings. That said bankrupt was served with a copy of said findings and order, and thereupon made an application to be relieved of default arising upon the claim that a review of the findings and order of the Referee upon the turn over proceedings could be filed within thirty days instead of ten days from the date of notice of such order. That such application or petition to be so relieved was heard and considered by this court and denied, and no appeal has been taken from this order, or any other proceeding herein had, and said findings and order of February 4th, 1935, have become and now are final.

That the bankrupt herein filed his petition in bankruptcy and was adjudged a bankrupt on the 10th day of October, 1934; that, on the 9th day of October, 1934, said bankrupt gave and transferred to his wife the sum of $1395.00, and, on the 10th day of October, 1934, the day upon which his petition was filed, and he was adjudicated a bankrupt, he gave to his wife the sum of $750.00. That said bankrupt, when questioned regarding these transfers to his wife, upon the dates aforesaid, gave no explanation of his act or acts and claimed that he did not remember the occurrence. That, within eleven months prior to the filing of the petition in bankruptcy aforesaid, said bankrupt transferred to said Grande California, Inc., a corporation wholly owned by said bankrupt, assets consisting of interest in contracts and trucks, also trans-

ferred supplies and merchandise to said corporation, and that such transfers were made to a corporation wholly owned by him, a corporation adjudicated by said order of February 4, 1935, to be the alter ego of said bankrupt. That, at the time of such transfer, he had creditors, had many and extensive debts; that many of his creditors were pressing him for collection thereof, and that the assets transferred by said bankrupt to said corporation, Grande California, Inc., were necessary for the payment of his debts, and such transfers were made to hinder his creditors.

CONCLUSIONS OF LAW

From the foregoing statement of facts and testimony adduced at the trial, the Special Master finds that Arizona Wax Paper Company is a co-partnership, consisting of T. G. Emmons and Chas. E. Goetz; that said Arizona Wax Paper Company is a creditor of said bankrupt, was a creditor of said bankrupt at the time of the filing of said petition by said bankrupt in voluntary bankruptcy, and can maintain the objections offered herein to the bankrupt's discharge.

The Special Master further finds that the order of February 4th, 1935, is a final order; that, by said order, it has been found and adjudged and decreed that said Joseph H. Grande, the bankrupt herein, for the purpose of preventing his creditors then existing from collecting their accounts against him, and also for the purpose of hindering and delaying and defrauding his creditors, as-

signed, transferred and set over, without consideration, automobiles, cash and merchandise, leases and contracts to a corporation known as Grande California, Inc. That such acts took place within the period specified by Paragraph 14-b (4) of the Bankruptcy Act. That the bankrupt, within a time the first day of which was subsequent to the first day of twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed and concealed his property with the intent to hinder, delay and defraud his creditors.

RECOMMENDATION

For the foregoing reasons, your Special Master recommends that the discharge of the bankrupt be denied. No charge is made by your Special Master for his services in connection with this hearing or the making of this report.

All papers are returned herewith as shown on the record of proceedings which accompanies, this report, together with the reporter's transcript(four volumes).

DATED at Los Angeles, California, this 6th day of August, 1936.

Hugh L Dickson

Special Master

[Endorsed]: Filed R. S. Zimmerman Clerk at 52 min. past 4 o'clock Aug. 6, 1936 P. M. By R. B. Clifton Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF FILING SPECIAL MASTER'S REPORT.

TO BENJAMIN W. SHIPMAN, 511 Pacific Mutual Bldg. Los Angeles.

JAMES DONOVAN, 947 Subway Terminal Bldg., Los Angeles.

Attorneys:

NOTICE is hereby given that the report of HUGH L DICKSON, Special Master, was filed in the office of the Clerk of the above entitled court on the 6th day of August, 1936.

Dated, August 6th 1936.

Hugh L Dickson
Special Master.

[Endorsed]: Filed R. S. Zimmerman Clerk at 43 min. past 10 o'clock Aug. 8, 1936 A. M. By F. Betz, Deputy Clerk.

[Title of Court and Cause.]

APPEAL OF BANKRUPT

EXCEPTIONS TO REPORT OF SPECIAL MASTER

TO: the Honorable William P. James, Judge of the United States District Court, in and for the Southern District of California.

Comes now, Joseph H. Grande, Bankrupt, and appeals from the report of the referee as Special Master in the above bankruptcy proceeding and assigns errors of the Special Master in his report to the Judges of said District Court:

1. On the last day in which a protest could be filed against the discharge of the bankrupt, Joseph H. Grande, Benjamin W. Shipman appeared in the District Court in the above cause and filed objections on behalf of the Sun Produce Exchange, alleged creditor of the bankrupt, also a protest against the discharge of the bankrupt by the Arizona Wax Paper Company, a co-partnership.

Benjamin W. Shipman who filed these protests was the duly and regularly appointed attorney for the Trustee in this bankruptcy proceeding and appeared throughout the proceeding as attorney for the trustee, and instituted a suit on behalf of the trustee covering certain property claimed in Selinas County, California, to be the property of the bankrupt.

The appellant objected at the hearing before the Master to whom these protests were referred, and called the Master's attention to the fact that the attorney for the trustee could not appear as special counsel for a creditor

as a protestant to the discharge of the bankrupt while he was acting as attorney for the trustee. This point will be later given attention.

2. Two general objections to the discharge of the bankrupt were filed; one made by the Sun State Produce Exchange and the other by the Arizona Wax Paper Company. The grounds of objections were the same; there were no specific charges or grounds upon which the Master would be authorized under the law, Sec. 14-b (4) of the *Bankrupt* Act, to act, as we will call the attention of the court to later.

The rule as the appellant understands it, is that an objection to discharge of a bankrupt must be specifically alleged; the grounds of objections must be as clear and specific as are the charges in an indictment, and only can the Master, to whom the matter is referred, consider anything other than what is specifically charged in the objections.

On the report of the referee as Special Master, a trial was had of the issues raised by the bankrupt petition of discharge and objections thereto filed by the objecting creditor etc. Evidence both oral and documentary was presented and submitted to the Special Master; the evidence being closed the cause was submitted to the Special Master for his report, findings and determination. The referee, as Special Master, reports as follows:

The record in this case before the Master will show:

1. That there was, and is, no specific charge against the bankrupt sufficient under the law to deny the bankrupt his discharge. At the outset we call the attention of the court to the fact that the Master in this case misconceived and misconstrued the law applicable to pro-

ceedings in objections to the discharge of a bankrupt. Neither under the original *Bankrupt* Act, the amendment of 1903 or the amendment of 1910, does a proper construction of the law justify any such procedure as was taken under the order under which the Master acted in this particular case. When the matter was called for hearing the attorney Shipman offered in evidence the transcript of the testimony taken at the former hearing by the Referee in Bankruptcy, Turnbull, and also offered in evidence the decree of findings of Referee Turnbull, all of which were objected to by the attorney for the bankrupt, Grande, and which, as we allege and assign as error, was wholly inadmissible for any purpose in the proceedings ordered before the present Master.

3. On page 2, beginning at line 3, the report of the Master designates the character of issues, and under this head we find fault, after reciting the fact that this procedure is under Section 14-b (4), as follows:

"That the bankrupt had at any time subsequent to the first day of the twelfth month immediately preceding the filing of the petition, transferred, removed, destroyed or concealed or permitted to be transferred, removed, destroyed or concealed any of his property, with intent to hinder, delay or defraud his creditors."

This is the basis upon which the Special Master sought to permit evidence to be offered in support of the allegations contained in the protest of the creditors opposing the discharge of the bankrupt, upon which no evidence of any kind or character was offered within the rule of construction or the rule of requirement under Section 14-b (4).

Under the head of Findings of Fact in the Master's report we find the following: "The objecting creditor is a creditor of the bankrupt". Then it recites that up to October 1933, the Sun State Produce Exchange was a corporation, and in October of 1933 it dissolved its corporation as stated in the findings. The referee then goes on and makes a finding that the indebtedness claimed by the objecting creditor was incurred by the bankrupt before the dissolution of the corporation, and that a judgment was rendered or secured by the objecting creditor against the bankrupt, and that judgment has not been satisfied, and that the objecting creditor filed a claim based upon that judgment. Then it recites the fact that the Trustee in Bankruptcy in this particular case filed a petition or application through his attorney, Benjamin W. Shipman against the bankrupt for a turn-over order, which turn-over order the referee, Turnbull, denied. The Referee, Turnbull, then made certain findings as to the Grande-California, Inc. and the Special Master in this case proceeds to recite what his predecessor, as referee, found in the case as it was heard before the Referee Turnbull; and on page 3 of this report it reads: "That such proceedings were had in connection with said application or petition that, on or about the 4th day of February, 1935, findings and orders were made and entered, which findings and order have become final, and to which proceedings the bankrupt was a party, as aforesaid."

Then this Master further finds: "It was found that, within eleven months prior to the filing of the voluntary petition in bankruptcy, the bankrupt herein transferred, assigned and set over, without consideration, automobiles, cash, merchandise, leases and contracts, to said corpora-

tion, Grande-California, Inc. That, at said time, said bankrupt had many and extensive debts and at least one judgment against him."

This finding is not sustained or based upon anything that was offered in evidence properly before the Master to whom this hearing was had. He simply goes on and recites what was found by the former referee in bankruptcy, but which matter was not within the jurisdiction of the present master to review. The record will show that when the hearing opened, Attorney Shipman looked to the bankrupt and to his attorney, James Donovan, as much as to indicate that it was their move. After some delay, as the record will disclose, Shipman rose and offered in evidence the testimony taken before the Referee Turnbull—offered it in bulk, and there was no evidence offered or any witnesses called on behalf of the protestants, either the Sun State Produce Exchange or the Arizona Wax Paper Company. The only person present representing at any of the hearings was the attorney Shipman, who was the attorney for the Trustee, Attorney for the protestants and who at no time offered any specific evidence than to tender the bulky record and the report of the referee, Turnbull, upon which to base his objections to the discharge of the bankrupt. There was no specific evidence of any kind or character offered to sustain this finding, "the bankrupt herein transferred, assigned and set over, without consideration, automobiles, cash, merchandise, leases and contracts to said corporation, Grande-California, Inc." There is no specific statement anywhere in the evidence shwoing that any property transferred or assigned to the Grande-California, Inc., was transferred to said corporation without a valid consideration.

The findings further proceed as follows:

Reviewing the former findings of Referee Turnbull—

"It was further found in said proceedings, (referring to the proceedings in bankruptcy), in which said findings and order have become final, that said corporation, to-wit: Grande-California, Inc., was caused to come into being and to exist for the sole purpose of permitting the said bankrupt to do business without being hindered by his creditors."

Then:

"It was further the conclusion of the court from the facts and the evidence that said Grande-California, Inc., was the alter ego of Joseph H. Grande."

Then it says:

"The aforesaid findings and order were introduced in evidence, together with the file appertaining to the above entitled case."

Then it siiply goes on and relates that later the report made by the former referee in bankruptcy was a final order because an appeal had not been taken within a period of ten days. And on page 4, we find the following:

"That said bankrupt was served with a copy of said findings and order, and thereupon made an application to be relieved of default arising upon the claim that a review of the findings and order of the Referee upon the turn-over proceedings could be filed within thirty days instead of ten days * * *".

It would seem from the language here used that the Master is laboring under the misapprehension that Referee, Turnbull, made a turn-over order, but such is not the

case. The record clearly shows that during the proceedings at this hearing, Attorney Shipman petitioned and sought a turn-over order against Joseph H. Grande, Bankrupt, also attempted to obtain a turn-over order against Mrs. J. H. Grande, and which the Referee Turnbull denied.

Then it was further found on page 4 as follows: (which is a part of the original finding of the predecessor Referee Turnbull)

"That, on the 9th day of October, 1934, that said bankrupt gave and transferred to his wife the sum of $1395.00, and, on the 10th day of October, 1934, the day upon which his petition was filed, * * * he gave to his wife the sum of $750.00."

Now, if this Referee, or Master had read the record he would not have reached this conclusion, for the record clearly shows that the Grande-California, Inc., was doing business at the Selinas National Bank at Selinas, California, and upon an attachment being filed or run against certain property, and the account being carried in the bank in the name of the Grande-California, Inc., at the suggestion of the bank, to avoid annoyance both to the bank and to the Grande-California, Inc., the manager of the bank suggested that the account be transferred to the name of Mrs. Joseph H. Grinde, all of which was clearly and explicitly explained by Mrs. Grande, when she was several times severely cross-examined both by Attorney Shipman and by the Referee.

If what is found on pages 4 and 5 by the Master was true, or any inference of truth could be drawn from it, either the report of the original referee, Turnbull, or the acceptance of the present Master of this finding, and all

of it appeared before the master as the truth and sufficient upon which to make a finding against the discharge of the bankrupt, Joseph H. Grande, then either Joseph H. Grande should be indicted and prosecuted or else the United States District Attorney should investigate those who are appearing in objection to the discharge of Joseph H. Grande and the motive behind it.

It appears in the testimony that was offered in bulk by Shipman to the Master in this case that there was either trucks or automobiles in which Grande-California, Inc., had certain equities. The trucks were sold by the Studebaker people to Joseph H. Grande. He had made some payments upon them. The title, as is well known to everyone, was a conditional sale, reserving the title in the seller. Grande, in his report of his assets did not disclose that he had an equity in these trucks. When he was called upon to state what property he had he did not name these trucks because he did not have the legal title, but as soon as the hearing opened, then it was clearly presented to the referee the true condition, and none of the property of the bankrupt can anywhere be found to have been concealed, sold, disposed of or any way used by the bankrupt, Joseph H. Grande, to hinder or delay the payment of his creditors.

The Master in this case is not justified, and all that appeared before the Master does not justify the findings as follows:

"The testimony of the bankrupt throughout the proceedings showed an entire lack of good faith and desire on the part of the bankrupt to tell the truth about his financial affairs. For example, on page 90 of the transcript, when asked:

'Q. What was your income in 1931?
A. I don't know.'

"and on page 110 of said transcript, at line 22:

'Q. How much did you make in 1931
A. Well, I could not exactly say.
Q. Well, approximately.
A. I must have made fifteen or twenty thousand dollars.
Q. In 1931?
A. I think so.'"

And the Master concludes:

"And the record is replete with instances of similar kind."

It is a strange situation that a Master called upon to hear evidence should read what transpired upon a former hearing before a former Referee, and should pass upon the credibility of that record that was not before him as a proper procedure under the order under which he is acting herein. Such findings are indeed contrary to the instructions given to the Master to find on the specific objections—if there were specific objections upon which the Master could find.

Then the Special Master in this hearing proceeds as though he was trying this case in the Superior Court of the State of California and makes wholly unnecessary conclusions of law, not justified by any evidence regularly before him, and further on page 6, line 13, the Special Master finds "that the order of February 4, 1935, is a final order; that, by said order it has been found and adjudged and decreed that said Joseph H. Grande, the bankrupt herein, for the purpose of preventing his creditors then existing from collecting their accounts against him,

and also for the purpose of hindering and delaying and defrauding his creditors, assigned, transferred and set over, without consideration, automobiles, cash, and merchandise, leases and contracts to a corporation known as Grande-California, Inc."

Then follows this statement: "That such acts took place within the period specified by Paragraph 14-B (4) of the bankruptcy Act."

This is not a section providing for certain acts done within a specified period. That section provides, as we will later show, that the bankrupt is entitled to a discharge unless he has been guilty of a criminal act for which he has been convicted, or of such gross mis-conduct that will make him of like standing with an ordinary criminal. That is what must be shown in order to deny a discharge. Moreover, if what is found and what is presented to the court as a recommendation for the denial of the discharge of Joseph H. Grande, Bankrupt, is to be considered at all, then Joseph H. Grande should have been indicted and prosecuted criminally rather than to be hounded by criminal charges against him, upon which it is well known to the parties protesting against the discharge of Grande that they could not maintain or justify in any criminal procedure, but are using this procedure to harass and annoy the bankrupt.

If Grande concealed any property, that property could be pursued when the discovery of its concealment was manifest, and recovered. No evidence appears in the record anywhere of any such an effort on the part of Shipman or the protesting creditors against the discharge of Grande.

What is said with respect to the Sun State Produce Company, is likewise applicable to the objections made by the Arizona Wax Paper Company, a co-partnership, as each base their objections upon practically the same ground, and only this would be found in the protest of either—that one was a co-partnership and the other was a corporation. In neither of these cases, as above stated, does the record show that anyone connected with the Arizona Wax Paper Company appeared at any one of the hearings that were had before the Special Master, and the only person appearing was the Attorney Shipman, who without authority from the other creditors was acting alone as attorney for the Trustee in this special proceeding.

Mrs. Joseph H. Grande, a daughter, Hazel Grande, a son, Robert Grande, have been from 1934 up to the hearing on this matter, pursued by secret investigations, to see perchance if anywhere there could be found anything that would look crooked, upon which the protestants in this case, and the representative of the protestants could hang their hat.

We appeal from the findings in each of these protests to the Judge of the United States District Court before whom this case is regularly on his calendar—the Honorable William P. James, and call the attention of the Master and the court to the law applicable to this procedure as laid down by Collier in his 13th edition.

In Colliers Bankruptcy Procedure, 13th Edition, Vol. 1, Sec. 14, page 493, this section is construed in 250 Fed. 1005, and in 96 Fed. 468, the court says:

"No other creditor can file, nor one filing can speak for the others; each protesting must file specific objections and he can speak for himself alone."

Construing this section in 248 Fed. 115, the court said:

"The Trustee could not appear as a protestant against the discharge of the bankrupt, unless authorized by all of the creditors."

Taking this as a basis, we call the attention of the court to this fact, that if the trustee could not appear, except by a vote of the majority of the creditors, as protestant, then surely his attorney could not appear, except after the Trustee had obtained the authority from the creditors so to do. One creditor alone cannot, nor two creditors could not authorize the trustee to appear as a protestant against the discharge of a bankrupt. That being true, then surely his attorney has no right or authority to appear as such, nor can he appear as attorney for one of the creditors until he has been relieved and discharged as attorney for the Trustee, which is not true so far as Shipman is concerned in this case. See 248 Fed. 115.

The attention of the court is called to the form of the protest against the discharge for the reason that it must be of that clearness that a practical form is provided and recognized by the highest standard of authority on bankruptcy. On page 2548, Colliers 13th Edition, Vol. 3, form No. 326, is that form which is used in making protests against the discharge of bankrupts, and the necessity for specific charges is fully discussed in 140 Fed. 222 and 173 Fed. 484.

On page 498 of Vol. 1, Colliers 13th Edition, Sec. 14-b (4), it reads:

"Allegations sufficient to show that all essential facts existing bring the opposition within the grounds specified by the statute, * * * they should be pleaded with

greater particularity than complaints in civil actions; indeed, they more nearly resemble indictments." 93 Fed. 440.

"Mere general averments are not sufficient." 140 Fed. 222, 197 Fed. 648.

Mere conclusions of law and alternative general averments are not sufficient, nor allegations based on information and belief.

"Referee as Master should not base a finding upon original examination of the bankrupt before him as a referee.

Applying this rule of law, the Master, Dickson, had no right or authority to take what appeared to have been given by Referee, Turnbull, and adopt it as evidence in this case upon which to make his finding.

"Neither should the new Master use the record of the Referee upon which to base his findings." 162 Fed. 983.

"Special Master should not report upon questions presented by the specification of objection to a discharge without having examined and heard the testimony. For the presence of the witnesses in a contested controversy is vital to the proper determination."

We further call the attention of the United States District Court in our appeal from the rulings and findings of the Master, and assign as error the failure of the Master to follow the rules of evidence and the rules of law governing in cases of the instant character. Following, in Section 14 of Colliers above quoted, under the set of rules of evidence, proof required, this rule is laid down:

"The ordinary rules of evidence control. Evidence will be confined to the specifications and objections." 268 Fed. 1006.

"The burden of proof is upon the opposing creditor." Page 511, Vol. 1, Sec. 14 F. (3).

Then the following subdivisions must be established by the protesting creditor:

1. Concealment of assets must be specifically charged and proven.

2. Evidence of false oath must be clearly charged and proved, as in any other case. If the charge of p*u*rjury is made it must be supported by additional circumstances and one witness. Suspicious circumstances will not justify opposing the discharge of a bankrupt.

Page 520, Vol. 1-B. Commission of a crime other than those mentioned in Section 29 are not grounds for denial of bankrupt's discharge.

The policy of the law is to carry out the spirit of the Bankruptcy Act. In doing so—in denying the discharge of a bankrupt on grounds as is presented here, then the bankruptcy procedure would become a useless act to relieve persons of unfortunate financial conditions and give them an opportunity to begin anew. Or, in other words, before one who has either been forced into bankruptcy or one who voluntarily enters bankruptcy, something more must be presented than mere suspicion or a desire to annoy, or a desire to intimidate and attempt to coerce a bankrupt, and then demand impossible situations from him.

The charges must always be specific and they must be of that specific character that they are of sufficient legal force to indict and prosecute the individual under the different Sections of the bankruptcy Act, but unless a criminal act can be based upon allegations, it is little less than reprehensible for a creditor or his attorney to file a protest against his discharge, when at the time of the filing of the protest it is a well known fact that it is only to harass and annoy rather than to benefit the creditors.

Upon the foregoing statement we appeal and assign as error the different points that we have made and ask the Special Master to point out the evidence upon which he based his conclusion and to report to the court the fact that there was no witness appearing before the court to support any charges made by either of the creditors opposing the discharge of the bankrupt, so that the District Court and the Judge be*o*fre whom this matter is to be reviewed may know what was before the Master, and upon what he based his conclusions.

Respectfully submitted,

James Donovan

Attorney for Bankrupt.

Helena, Mont
Aug 13- 36

[Endorsed]: Filed R. S. Zimmerman Clerk at 35 min. past 4 o'clock Aug. 17, 1936 P. M. By R. B. Clifton Deputy Clerk.

ORDER DENYING DISCHARGE

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 15th day of September in the year of our Lord one thousand nine hundred and thirty-six

Present:

The Honorable Wm P. James, District Judge.

In the Matter of)
JOSEPH H. GRANDE,) No. 24154-Bank.
Bankrupt.)

Heretofore the bankrupt, Joseph H. Grande, petitioned for his discharge, to which objections were made by certain creditors, to-wit: Arizona Wax Paper Company and Sun State Produce Exchange. The hearing on said objections was referred to the referee in bankruptcy, who after full hearing thereof, reported to the Court recommending that the objections be sustained and the discharge denied; and thereafter the bankrupt having presented his objections to the report of the referee, which objections were argued before the Court and submitted on memoranda of authorities. And now the Court having carefully examined the record and considered the objections of the creditors as aforesaid, determines that the conclusion of the referee sitting as special master should be adopted: IT IS THEREFORE ORDERED that the objections of the bankrupt to the report of the referee and special master be and they are overruled and the petition for discharge is denied. An exception is noted in favor of the bankrupt.

[Title of Court and Cause.]

APPEAL OF BANKRUPT

TO: HONORABLE WILLIAM P. JAMES, JUDGE OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

The above named bankrupt, JOSEPH H. GRANDE, conceiving himself aggrieved by the Order and Decree of the Court made on the 15th day of September, 1936, in the above entitled cause does hereby APPEAL from said Order and Decree to the Circuit Court of Appeals, Ninth Circuit, for the reasons specified in the assignment of error which is filed herewith and PRAYS that this Appeal may be allowed and that a transcript of the record, proceedings and papers upon which said Decree was made, which said transcript of the record, or so much thereof as is desired on said appeal, duly authenticated, may be sent to the United States Circuit Court of Appeals, Ninth Circuit.

James Donovan
James Donovan
Attorney and Solicitor for Joseph H. Grande, Bankrupt.

The foregoing Appeal is allowed.

Dated: 14th day of October, 1936.

Wm P. James
DISTRICT JUDGE

[Endorsed]: Filed R. S. Zimmerman, Clerk at 57 min. past 9 o'clock Oct. 14 1936 A. M. By R. B. Clifton Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

IN THE MATTER OF)	In Bankruptcy No. 24154-J
)	
JOSEPH H. GRANDE)	ASSIGNMENT OF ERRORS
)	
Bankrupt)	

1.

The COURT erred in ordering a reference to Hugh L. Dickson, Referee in Bankruptcy, on December 2, 1935, on the following grounds:

A. That the Arizona Wax Paper Company and State Produce Exchange were the only creditors who filed objections to the discharge of Joseph H. Grande, Bankrupt.

B. That Benjamin W. Shipman is and was at all times since the Trustee in Bankruptcy was named attorney for the Trustee, William I. Heffron.

C. That said Shipman filed each of these claims as attorney for creditor before the Referee in Bankruptcy, as attorney for said creditor.

D. That on December 2, 1935, said Shipman filed each of these protests against the discharge of the bankrupt as attorney for each of said protesting creditors and verified one of the protests.

E. That there is no specific allegation in either of said protests of the Arizona Wax Paper Company or State Produce Exchange sufficient to justify the Court to refer the same to a Referee.

11.

That the Court erred in sustaining the report of the Referee in Bankruptcy, Hugh L. Dickson, in this:

A. The report shows that the Referee adopted a certain finding of his predecessor of date of February 4, 1935, without any evidence being offered covering the subject matter of said report of February 4, 1935 of his predecessor, Referee Turnbull, without giving the Bankrupt an opportunity to have investigated by Referee Dickson, the facts upon which the report of Referee Turnbull was made on February 4, 1935.

111.

The Court erred in sustaining the Referee's Report when there was no specific charge upon which the Master would be authorized under Section 14-b (4) of the Bankruptcy Act to act.

The Court erred in sustaining the Master's Report in this:

A. When the objection to the ground upon which the protests were made was not specifically charged.

B. In sustaining the Special Master's report in reciting what his predecessor, Turnbull, as referee found in the case, for no specific charge is made upon which this finding of Referee Turnbull could be predicated.

C. In sustaining the Special Master's finding as follows: "Then this Master further finds: "It was found that, within eleven months prior to the filing of the voluntary petition in bankruptcy, the bankrupt herein transferred, assigned and set over, without consideration, automobiles, cash, merchandise, leases and contracts, to said corporation, Grande-California, Inc. That, at said time,

said bankrupt had many and extensive debts and at least one judgment against him". This quotation discloses that instead of the Special Master hearing evidence and making his own findings, as directed by the Court, without any evidence he adopted the above quotation as a part of the finding of his predecessor, Turnbull.

D. There was no evidence offered before the Special Master to sustain the quotation of his predecessor as a part of his duty as such Special Master.

E. It was not within the jurisdiction of the Special Master to review the report of his predecessor. He was not called upon for such purpose and it was not within his jurisdiction.

IV.

The Court erred in sustaining the Referee's Report in this:

A. There was no evidence offered, or any witnesses called on behalf of the protestants. The only person present representing the hearings before the Special Master was Attorney *Shipment* who offered no evidence to sustain the specific charges in the protests.

V.

The Court erred in sustaining the Referee's Report in this:

A. In reviewing the former findings of Referee Turnbull the Special Master quoted the following:

"It was further found in said proceedings, (referring to the proceedings in bankruptcy), in which said findings and order have become final, that said corporation, to-wit: Grande-Californina, Inc., was caused to come into being

and to exist for the sole purpose of permitting the said bankrupt to do business without being hindered by his creditors,"

The Special Master further found, quoting from findings of Referee Turnbull:

"It was further the conclusion of the court from the facts and the evidence that said Grande-California, Inc., was the alter ego of Joseph H. Grande".

Quoting again from the findings of Referee Turnbull, the Special Master quotes:

"The aforesaid findings and order were introduced in evidence, together with the file appertaining to the above entitled case".

V1.

The Court erred in sustaining the Referee's Report in this:

A. The report of Special Master, Dickson, as the evidence or the facts upon which the Special Master drew his conclusions was not before the Court and the record that was before the Court disclosed that there was no independent investigation made by the Special Master upon which to base his findings.

B. The Special Master used this language in one of his findings:

"The testimony of the bankrupt throughout the proceedings showed an entire lack of good faith and desire on the part of the bankrupt to tell the truth about his financial affairs. Etc"

C. The Special Master was not called to review the action of his predecessor, Turnbull, or to in anywise pass judgment upon the conclusions reached by the Referee Turnbull.

V11.

The Court erred in sustaining the Referee's Report in this:

A. The erroneous conception of the Special Master as to what his duties were and to his appointment.

B. The Special Master assumed that he should pass upon the credibility of the record of his predecessor as a proper procedure under the order under which he was acting.

C. It was not the duty of the Special Master to determine whether the order made by Turnbull on February 4, 1935, was a final order.

V111.

The Court erred in sustaining the Referee's Report in this:

A. In sustaining the report of the Special Master when the record does not disclose there was any evidence offered or before the Special Master to sustain the allegations in the protests for discharge showing, or tending to show, that any automobile, cash, merchandise, leases or contracts, or any one or all of them, were concealed, converted to, or hidden from the Trustee or that any such property mentioned ever existed at all which could be diverted from the Trustee.

IX.

The Court erred in passing upon the Appeal from the Special Master in ignoring the law applicable to the procedure in this case.

A. In Colliers Bankruptcy Procedure, 13th Edition, Vol. 1, Sec. 14, Page 493, construed in 250 Fed. 1005 and in 96 Fed. 468 the Court said:

"No other creditor can file, nor can one filing *can* speak for the others; each protesting must file specific objections and he can speak for himself alone".

In construing this section in 248 Fed. 115, the court said:

"The Trustee could not appear as a protestant against the discharge of the bankrupt, unless authorized by all of the creditors".

B. In permitting Benjamin W. Shipman to appear in behalf of protestants as their attorney when he was still of record as the attorney for the Trustee.

X.

The Court erred in not following the rule of law announced on Page 2548, Colliers 13th Edition, Vol. 3, form No. 326, which is construed in 140 Fed. 222 and 173 Fed. 484 in which the form of protest to the discharge of the bankrupt is pointed out and the necessity for specific charges. On Page 498 Volume 1, Colliers 13th Edition, Section 14-b (4) it reads:

"Allegations sufficient to show that all essential facts existing bring the opposition within the grounds specified by the statute, * * * they should be pleaded with greater

particularity than complaints in civil actions; indeed, they more nearly resemble indictments." 93 Fed. 440.

"More general averments are not sufficient." 140 Fed. 222, 197 Fed. 648.

"Referee as Master should not base a finding upon original examination of the bankrupt before him as a referee".

X1.

The Court erred in sustaining the report of Special Master Dickson wherein it is shown that Special Master adopted as evidence in this case the findings made by the Referee, Turnbull, on February 4, 1935.

"Neither should the new Master use the record of the Referee upon which to base his findings". 162 Fed. 983. And the

"Special Master should not report upon questions presented by the specifications of objections to a discharge without having examined and heard the testimony. For the presence of the witnesses in a contested controversy is vital to the proper determination."

X11.

The Court erred in failing to follow Section 14 of Colliers as above quoted, under the set of rules of evidence, proof required, this rule is laid down:

"The ordinary rules of evidence control. Evidence will be confined to the specifications and objections". 268 Fed. 1006.

"The burden of proof is upon the opposing creditor." Page 511, Vol. 1, Sec. 14 (3).

Then the following subdivisions must be established by the protesting creditor:

1. Concealment of assets must be specifically charged and proven.

2. Evidence of false oath must be clearly charged and proven, as in any other case. If the charge of perjury is made it must be supported by additional circumstances and one witness. Suspicious circumstances will not justify opposing the discharge of a bankrupt.

3. Page 520, Vol. 1-B. Commission of a crime other than those mentioned in Section 29 are not grounds for denial of bankrupt's discharge.

Upon the foregoing Assignments of Error we ASK that the APPEAL be sustained and the Decision of the District Court be reversed.

RESPECTFULLY SUBMITTED,

James Donovan
Attorney for Bankrupt, Joseph H. Grande.

October 14-'36

[Endorsed]: Filed R. S. Zimmerman Clerk at 56 min. past 9 o'clock Oct. 14, 1936 A. M. By R. B. Clifton, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL AND DIRECTING SAME TO BE FILED.

THIS day came the Bankrupt, Joseph H. Grande, by James Donovan, his attorney, and presented his Petition for Appeal and his Assignment of Errors, and upon consideration thereof,

IT IS HEREBY ORDERED AND ADJUDGED that said petition and assignment of errors be and the same are hereby filed, and that the Petition for Appeal be and the same is hereby allowed to be reviewed by the Circuit Court of Appeals of the Ninth Circuit Court upon the appellant, Joseph H. Grande, bankrupt, executing a bond according to law in the sum of $250.00.

Dated this 14th day of October, 1936.

Wm. P. James
DISTRICT JUDGE.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 56 min. past 9 o'clock, Oct. 14 1936 A. M. By R. B. Clifton, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING

KNOW ALL MEN BY THESE PRESENTS:

THAT we, Daisy M. Grande, Harry T. Hughes are held and firmly bound unto ARIZONA WAX PAPER COMPANY and STATE PRODUCE EXCHANGE in the full and just sum of TWO HUNDRED AND FIFTY DOLLARS ($250.00), to be paid to the said Arizona Wax Paper Company and State Produce Exchange, heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors, or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 27th day of October, in the year of our Lord one thousand nine hundred and thirty-six.

WHEREAS lately on the 15th day of September, 1936, in the District Court of the United States, Southern District of California, Central Division in a suit pending in said court wherein Joseph H. Grande, bankrupt, is appellant and Arizona Wax Paper Company and State Produce Exchange were respondents, an Order and Decree of the Court was rendered against the said Joseph H. Grande, bankrupt, and the said appellant in the aforesaid suit, and a citation directed to the said respondents, Arizona Wax Paper Company and State Produce Exchange citing and admonishing said Arizona Wax Paper Company and State Produce Exchange to be and appear in the United States Circuit Court of *Appeal* for the Ninth Circuit, at the City of San Francisco, in the State of California, on the 12th day of November, A. D. 1936.

NOW, the condition of the above obligation is such that if the said Joseph H. Grande, bankrupt, appellant shall prosecute said appeal to effect, and answer all damages and costs if Arizona Wax Paper Company and State Produce Exchange fail to make good their plea, then the above obligation to be void, else to remain in full force and effect.

Sealed and delivered in the presence of

Daisy M. Grande
Henry T. Hughes

Approved by:

Wm. P. James
Judge

STATE OF CALIFORNIA)
: ss
County of Los Angeles)

HARRY T. HUGHES surety in the within undertaking, being duly sworn, says that he is worth the sum specified in the said undertaking over and above all his just debts and liabilities (exclusive of property exempt from execution) and that he is a resident within the State of California, and a property holder, therein.

Henry T. Hughes

Subscribed and sworn to before me this 29th day of October, 1936.

[Seal] June Eddy
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Nov. 4, 1936

Examined and recommended for approval as provided in Rule 28

James Donovan
Attorney

I hereby approve the foregoing bond

Dated the 30 day of Oct 1936

Wm P James
Judge

STATE OF CALIFORNIA, }
County of Monterey } ss.

Daisy M. Grande being by me first duly sworn, deposes and says: that *he* is the surety in the above entitled action; that she has read the foregoing appeal bond and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

Daisy M Grande

Subscribed, and sworn to before me this 27th day of October 1936

[Seal] Walter E Morris
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 34 min. past 4 o'clock Oct. 30, 1936 P. M. By F. Betz, Deputy Clerk

[Title of Court and Cause.]

PRAECIPE

TO THE CLERK:

You are requested to make a transcript of records to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Findings of February 4, 1935

2. Motion and order to show cause why the Referee should not certify to the court the transcript of his proceedings in support of the findings of February 4th, 1935

3. Denial of motion to show cause of February 27, 1935

4. Referee's certificate of compliance, dated September 23, 1935 .

5. Bankrupt's petition for discharge of October 8, 1935

6. Affidavit of publication and order of hearing thereon of December 2, 1935

7. Protest filed by Benjamin W. Shipman, attorney for the Arizona Wax Paper Company of December 2, 1935

8. Minutes of the court of December 2, 1935

9. Special Master's report.

10. Notice of filing of Special Master's report

11. Petition for review to the District Court of the Special Master's report

12. Ruling of the court on the petition for review of Special Master's report

13. Petition for appeal to the Circuit Court

14. Order allowing appeal

15. Assignment of errors.

16. Citation

17. Appeal bond

18. Praecipe for transcript on appeal to Circuit Court.

Dated this 2nd day of December, 1936.

James Donovan
Attorney for Joseph H. Grande,
Bankrupt and Appellant

[Endorsed]: Received copy of the within Praecipe this 2nd day of December 1936 B W Shipman, attorney for Objecting Creditors Filed R. S. Zimmerman, Clerk at 11 min. past 3 o'clock Dec. 2 1936 P. M. By F. Betz, Deputy Clerk.

[Title of Court and Cause.]

APPELLEES' PRAECIPE

To: the Clerk of the United States District Court, for the Southern District of California, Central Division:

In making up the transcript of record for the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, you will please incorporate the following additional portions of the record not appearing to have been requested by the appellant herein:

1. Findings and Order by Referee Rupert B. Turnbull, dated February 4, 1935;

2. Opinion and Order by Hon. Wm. P. James, District Judge, dated February 27, 1935.

Dated: November 23rd, 1936.

Benj. W. Shipman
Attorney for Objecting Creditors.

[Endorsed]: Received copy of the within Appellees' Praecipe this 24 day of November 1936 James Donovan, attorney for appellant. Filed R. S. Zimmerman Clerk at 13 min. past 4 o'clock Nov. 24, 1936 P. M. By R. B. Clifton, Deputy Clerk.

[Title of Court and Cause.]

APPELLEE'S PRAECIPE

To: the Clerk of the United States District Court, for the Southern District of California, Central Division:

In making up the transcript of record for the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, you will please incorporate the following additional portions of the record not appearing to have been requested by the appellant herein:

1. Specifications of Grounds of Opposition to Bankrupt's Discharge of Arizona Wax Paper Company;

2. Specifications of Grounds of Opposition to Bankrupt's Discharge of Sun State Produce Exchange.

Dated: December 8, 1936.

Benj. W. Shipman
Attorney for Objecting Creditors

I object to that portion of the appellees' praecipe No. 2, "Specifications of grounds of opposition to bankrupt's discharge of Sun State Produce Exchange," for the reason that said objections were not filed until 4:30 o'clock P. M. on the 2nd day of December, 1935, as appears from the minutes of the court's record on said 2nd day of December, 1935.

Dated this 10th day of December, 1936.

James Donovan
Attorney for Bankrupt

The above additional portions of the record are ordered included and an exception is noted in favor of the bankrupt.

Wm. P. James
Dist. Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk at 13 min. past 4 o'clock Dec 8 1936 P. M. by R. B. Clifton, Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 79 pages, numbered from 1 to 79 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; findings and order; motion and order to show cause; opinion and order on petition of bankrupt for extension of time to file petition for review of Referee's order; Referee's certificate of compliance; bankrupt's petition for discharge and order thereon; affidavit of publication; specifications of grounds of opposition to bankrupt's discharge of Arizona Wax Paper Co.; specifications of grounds of opposition to bankrupt's discharge of Sun State Produce Exchange; order referring objections to Special Master; report of Referee as Special Master on creditors' objections to bankrupt's petition for discharge; notice of filing of Special Master's report; exceptions to report of Special Master; order denying discharge; appeal of bankrupt; assignment of errors; order allowing appeal; undertaking on appeal; praecipe; appellee's praecipe and additional praecipe of appellee.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this ..... day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixty-first.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8411

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
JOSEPH H. GRANDE,
Bankrupt.

Joseph H. Grande,
Appellant,
vs.
Arizona Wax Paper Company and State Produce Exchange,
Appellees.

Appellant's Brief on Appeal From the District Court of the United States for the Southern District of California, Central Division.

JAMES DONOVAN,
417 South Hill Street, Los Angeles,
Solicitor for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 8411

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

JOSEPH H. GRANDE,

Bankrupt.

Joseph H. Grande,

Appellant,

vs.

Arizona Wax Paper Company and State Produce Exchange,

Appellees.

Appellant's Brief on Appeal From the District Court of the United States for the Southern District of California, Central Division.

STATEMENT OF FACTS INVOLVED IN THIS APPEAL.

Joseph H. Grande filed a petition in voluntary bankruptcy in the District Court of the United States for the Southern District of California, Central Division, on October 10, 1934, and was declared a bankrupt, and the same was referred by the Hon. William P. James, Judge of said Court, to the Referee in Bankruptcy, Rupert B. Turnbull.

Later, William I. Heffron was appointed Trustee in Bankruptcy.

Upon the citation of said Referee Joseph H. Grande, Daisy M. Grande, his wife, Hazel D. Grande, his daughter, and others, were cited by the Trustee for examination, and on several occasions Joseph H. Grande, Bankrupt; Daisy M. Grande, Hazel D. Grande, and other persons, were put on severe, and what appears to be cross-examination, both by the Trustee and the Referee, without in any wise discovering or disclosing that Joseph H. Grande, Daisy M. Grande, Hazel D. Grande, or any other person or corporation, had in their or its possession any property belonging to the Bankrupt, or that any property was concealed either by the Bankrupt or any one in his behalf, and without specifying any specific property still retained in the possession of the Bankrupt, or the persons above named, the Trustee in Bankruptcy filed with the Referee a petition for a turn-over order, which petition did not disclose or contain any fact required by law or the rules of the procedure in bankruptcy, and based his petition for a turn-over order upon information and belief, which turn-over order was thereupon denied. Thereupon the Court dismissed said petition and permitted the same petition to be refiled, under the positive oath of the Trustee, and after hearing evidence on said petition the Referee made an order, which is found, beginning on page 3 of the transcript of the record to page 8, inclusive, which said order was certified by the Referee on the 6th of February, 1935, and filed in the Federal Court at 10 a. m. February 25, 1935.

On the 21st of February, 1935, the Bankrupt, through his attorney, filed a petition with the Hon. William P.

James, Judge of said Court, for an order to show cause why the Bankrupt should not be permitted to file a petition for review of the turn-over order. [Tr. pp. 9 to 13.] Hearing was had on the 25th of February, 1935, on said petition of the Bankrupt, and on February 27, 1935, the Court made an order denying the petition of the Bankrupt. [Tr. pp. 15 to 17.]

On the 23rd of September, 1935, the Referee in Bankruptcy, Turnbull, caused to be signed by him a certificate of compliance, which was filed in the United States District Court at 20 minutes past 3 o'clock, September 26, 1935. [Tr. p. 18.] Thereupon the Bankrupt, Joseph H. Grande, filed a petition for discharge and order thereon. [Tr. p. 19.] Order of notice was issued by the clerk of said Court on the 9th day of October, 1935. [Tr. p. 20.] In said notice part of the same as published is as follows: "Any creditor objecting to the discharge of the above bankrupt must file specifications of the grounds of his objections in writing with the clerk of the U. S. District Court at or before the time of hearing said matter as an extension of time may not be allowed for that purpose. U. S. Supreme Court form No. 58 has been prescribed for such specifications." Filed at 53 min. past 2 o'clock Oct. 9, 1935. [Tr. p. 20.] On page 21 affidavit of publication was filed at 55 minutes past one o'clock on October 23, 1935. [Tr. p. 21.] The order of notice of publication is in part as follows: "Ordered by the Court, that a hearing be had upon the same on the 2nd day of December A. D., 1935, before said Court, in the Federal Building, at Los Angeles in said District at 10 o'clock in the forenoon; and that notice thereof be published in The Los Angeles Daily Journal. * * *." On December 2, 1935, Benjamin W. Shipman, attorney for the Arizona

Wax Paper Company, filed specifications of grounds of opposition to the Bankrupt's discharge, and as such attorney verified the same at 10 a. m. December 2, 1935, in said Court. [Tr. pp. 22 to 26, incl.] On December 2, 1935, Benjamin W. Shipman, as attorney for the Sun State Produce Exchange, filed specification of grounds of opposition to the Bankrupt's discharge on behalf of the Sun State Produce Exchange, which said specifications were filed by said Shipman at 4:30 p. m. on the 2nd day of December, 1935, which specifications begin on page 27 and continue to page 30, inclusive, of the transcript, and on page 31, wherein the order referring objections to Special Master was made by the Judge of said Court, the minutes of said Court show that the opposition to the Bankrupt's discharge by the Sun State Produce Exchange was filed at 4:30 p. m. of December 2, 1935, after the time at which said specification could be legally filed.

On page 32 of the transcript is the report of the Special Master, Hugh L. Dickson, which report begins on page 32 and ends on page 45. The appeal of the Bankrupt, exceptions to report of Special Master [Tr. pp. 46 to 60] was filed on August 17, 1936. On September 15, 1936, the Court denied the appeal of the Bankrupt and the exceptions to the report of the Special Master. [Tr. p. 61.] On the 14th of October, 1936, an appeal was allowed and filed. [Tr. p. 62.] Assignment of errors, beginning on page 62 and ending on page 70, inclusive, were filed at 56 minutes past 9 o'clock October 14, 1936. Order of the Court allowing the appeal and directing the same to be filed, October 14, 1936. [Tr. p. 71.] Undertaking approved and filed on the 30th of October, 1936. [Tr. p. 74.] Praecipe of appellant. [Tr. pp. 75 to 76.] Praecipe of appellee, dated December 8, 1936, and the exception to

the filing of specification of grounds of opposition to the Bankrupt's discharge of Sun State Produce Exchange, excepted to by the attorney for the Bankrupt, which exception was allowed by the Court, filed December 8, 1936. [Tr. p. 79.]

Upon the foregoing facts Joseph H. Grande, appellant, appeals to the Circuit Court of Appeals for the Ninth Circuit, and bases his right to have the rulings of the Referee in Bankruptcy, Special Master, and the rulings of the United State District Court reversed and set aside and the Bankrupt discharged.

LAW OF THE CASE.

I.

Appellant has assigned twelve specific grounds of error, made by the United States District Court in its different rulings in the above bankruptcy procedure. Many of these errors, as specifically set forth in detail, may be covered by three general subdivisions, and in order to put the assignments of error in these three general subdivisions, the appellant does not waive the objections made in detail and upon which he relies to have this action reversed.

Preliminary to the discussion of the errors relied upon, the evidence that was called forth by the Referee and the Trustee in Bankruptcy, in the examination of the Bankrupt and in the examination of the other witnesses, could not be brought into this record, for the following reasons:

(a) The Bankrupt could not, under any circumstances pay for the testimony taken by the stenographer before the Referee and before the Trustee.

(b) The greater part of the examination of the Bankrupt, his wife, and other witnesses, called and examined by the Trustee before the Referee, disclosed nothing that was relevant or pertinent to the duties of the Referee or Trustee.

As the appellant's counsel understands the law of bankruptcy, it is in the nature of equitable relief to persons who have honestly fallen into an unfortunate situation financially, where they are overwhelmed and burdened with debts, and by circumstances over which the bankrupt has no control he is unable to meet his obligations and is continually harassed by his creditors. His only escape, whereby he may begin anew in life and be relieved of his misfortune is by turning over to his creditors all that he possesses, except what is expressly exempt by specific acts of law. This is the condition in which the appellant availed himself of a voluntary bankruptcy procedure, and when he tenders to the Court his petition and a list of all of his assets and subjects himself to the scrutiny of the Court in bankruptcy, the presumption of law goes with him, that he is acting honestly and in good faith to rehabilitate himself as the law directs. If, however, he avails himself of the benevolent provisions of the law and conceals from his creditors and from the Court any part of his assets, then he becomes civilly and criminally a subject for the Court to chastise.

The law further provides that if either the bankrupt or any other person has in his or its possession property belonging to the bankrupt, and which should be subjected to the control of the Court for the benefit of his creditors, and this concealment is actuated by the bankrupt, either alone or in concert with friends, then both are subject to

the severe scrutiny of the Court, and if by any investigation it is disclosed to the Referee that the bankrupt has concealed or is attempting to conceal property that should be turned over to the Trustee, then it is the duty of the Referee to issue a turn-over order, specifically directing the particular property that is concealed to be at once turned over to the Trustee.

The law requires that when a turn-over order is asked for that the Trustee or whoever is instrumental in asking for the turn-over order shall verify the same, not on "information and belief," but he must have positive knowledge of the facts upon which the turn-over order is sought, is true, and the specific property sought in the turn-over must be specifically and accurately named, so that the order must be of such character and force that the marshal or officer of the Court can determine from the turn-over order what particular property is sought and where it is, so that the warrant or order, based upon the turn-over order, when placed in the hands of the officer of the Court, he may be able to find the specific property charged with being concealed by the bankrupt; otherwise, no turn-over order is of any force or effect.

We bring this appeal, so far as the record shows, upon the turn-over order of February 4, 1935, and point out to the Court that the Referee in Bankruptcy in this order has recited that the original petition for the turn-over order was defective, in that it was sworn to on information and belief, and under objections of the Bankrupt said objections were sustained; that the Trustee renewed the petition by verifying it "absolutely, and not on information and belief," and the Court thereupon issued the order of February 4, 1935. [Tr. p. 3.] In this order there is

no specific finding that the Grande-California, Inc., had any property of any kind or character, and on page 5 of the transcript is the following:

> "The Court finds that no person invested any money, either as a contribution to capital assets, or otherwise, to Grande-California, Inc., either at the time it was incorporated, or at any time since, and that Joseph H. Grande is the owner in fact of said corporation, its corporate stock, and all of its assets."

There is no finding, however, that the Grande-California, Inc., ever did have any assets, nor is it anywhere pointed out or suggested in the findings that the Grande-California, Inc., had any assets.

The conclusions are—

> "That the bankrupt, Joseph H. Grande, is the sole owner of all of the capital stock of said corporation, and all of its assets, including its trucks, cash, merchandise, leases and contracts, and personal property of every kind and description," etc. [Tr. p. 6.]

A fair inference, and the only just conclusion that could be founded upon this order, is that the Grande-California, Inc., had no assets, and when it is suggested by the Referee that Grande should turn over the capital stock of the corporation, all of its assets, etc., the Referee should have found what the assets were. There were no assets. Nothing could be turned over that did not exist. Then it is further ordered [Tr. p. 7] that the Trustee

> "forthwith take immediate possession of all of the assets of the bankrupt, standing in the name of Grande California, Inc., whether the same exist at Salinas, California, or elsewhere, and use all necessary force so to do."

A further part of this order is:

"That Grande California, Inc., is in fact Joseph H. Grande." [Tr. p. 7.]

There nowhere appears in the record, nor does the record anywhere disclose, that this order of the Court has been in anywise violated. If it were true, as found in the order, that Grande-California, Inc., had trucks, cash, merchandise, leases and contracts and personal property, and that Grande-California, Inc., was Joseph H. Grande, and either the Grande-California, Inc., had possession of any of the assets of Joseph H. Grande, or Joseph H. Grande had possession of any assets other than as disclosed in his petition in bankruptcy, and he failed to turn them over to the Trustee, he should have been cited for contempt for so failing to do, or he should have been arrested and prosecuted for perjury. No such procedure was followed, because there was no property upon which such procedure could be based.

Knowing the defects of such order, the attorney for Grande filed, on the 21st day of February, 1935, a motion and order against the Referee to show cause why he should not transmit to the Court a transcript of the proceedings on which the findings were made. Upon this order the Court directed that the Referee should make a response to the order on the 25th of February. In response to this order to show cause, which appears in the transcript at pages 9 to 14, inclusive, the Court denied, on page 15 of the transcript, the petition for extension of time to file a petition for review of the Referee's order of February 4, 1935.

Under the Federal procedure in bankruptcy, U. S. Compiled Statutes and Supplements thereto, it is provided that

any one dissatisfied with an order of the Referee could appeal or file a petition for review in the District Court within thirty days. Relying upon this rule the appellant in this case filed his petition on February 21, 1935, but under the rule, as marked in the opinion of the Judge of the United States District Court, denominated Rule 84, the time in which to petition for such a review was ten days. This is a local rule made by the District Court and was not known to counsel for petitioner, and no way of discovering said rule until a mistake was made as in this instance.

This case, as indicated above, being of a special equity character, this turn-over order of February 4, and the ruling of the Court upon the same on February 27, 1935, is not of such force or effect as will mar or disturb the Circuit Court of Appeals from fully considering the equitable features of this appeal.

We have heretofore pointed out the inherent weakness of the order of February 4, 1935, and will later apply the law in support of the claim of the weakness of the order of February 4, 1935.

The Referee, Turnbull, and the special master and counsel for the Trustee, endeavor to put much stress upon the decision of Judge James of February 27, 1935, and it is referred to in the master's report as a final judgment. In the two protests against the discharge of the Bankrupt, each of the protests has attached to it as an exhibit or part of the protest a copy of the order of the Referee of February 4, 1935. An attempt is made to make much of this order of February 4, 1935, and affirm that the dismissal of the application of the Bankrupt for a review of the order of February 4, 1935, as a final judgment. An examination of the judgment of February 27, 1935,

will show that it passes only upon one fact, namely, that the Bankrupt was too late under Rule 84 in filing his petition, and that was all that the Court could decide. The Court had to either say that it had jurisdiction to hear the application of the Bankrupt or it had to deny that it had jurisdiction, having held that the Bankrupt was too late in his application, that the time in which he should appear was governed by local Rule 84. That rule fixes the time for the Bankrupt to appear. The Bankrupt and his attorney, being misled by relying upon the rule fixed both by the United States statute and announced in the bankruptcy rules of the Supreme Court of the United States, relied upon those rules as governing the time in which the Bankrupt had to either appeal or file his petition for review of the act of the Referee. We concede that the local United States District Court may make rules for itself and these rules must be promulgated by the Court, but they cannot be inconsistent with or in anywise revoke a statutory rule of the United States, or a rule adopted by the Supreme Court. However, in this instance the Court held that the Bankrupt was too late, or in other words, like a passenger at a railroad station who got hold of the wrong folder and when he arrived at the station the train had gone. That is all that the Court decided, and that is all the observation the Court could make, except dicta. The Court could not hold that it had no jurisdiction because the review had not been sought in time and then proceed to discuss the merits of the case or make any observation touching the petition for review that would be in anywise binding upon any party to the action, when it held that the petition was not filed in time. The Court had to do one or the other of two things, it either had to hold that the petitioner

was too late, and having so held he could not then proceed to make observations on the merits of the case that would have any legal force, and such a ruling could not, under any form of law, be construed into making the order of the Referee of February 4, 1935, a final judgment, as held by the Master. The books are full of decisions that no finding of a Court or a subordinate branch of the United States procedure, like the Referee in Bankruptcy, can make any final order, especially so upon a default. A final judgment in bankruptcy is only secured when the facts involved have been heard upon their merits.

II.

The next point on which the appellant directs the attention of the Court is the order of the Referee of September 23, 1935. [Tr. p. 18.] This order was signed by the Referee, Turnbull, and filed with the clerk of the United States District Court on September 26, 1935, and reads in part as follows:

> "that so far as appears from the record and files of my office and matters coming to my attention said Bankrupt has complied with all the orders of the Court and the requirements of the Bankruptcy Act and has committed none of the offenses and done none of the things prohibited by said act."

Taking this statement of the Referee, seven months after the signing of the turn-over order of February 4, 1935, what is the conclusion to be drawn from this order? We must give to the Referee, Turnbull, what the law entitles him to, that this order speaks the truth; that the Referee would not sign such an order to pave the way for the Bankrupt to be discharged if in his judgment he was not entitled to be discharged. This order is no

idle informality, but it is the established step in the procedure under the bankruptcy act, and whatever precedes the signing of this order, or whatever observations the Referee may make in any preceding order or statement, when he signs this order he gives character and standing to the Bankrupt that will entitle the Bankrupt to file his petition for discharge; but, as a mattter of safeguard both to the creditors and the Referee or Trustee, and the Bankrupt and others, still a reservation is made that all of the creditors may join in asking the Trustee to protest the discharge, or any individual creditor has reserved to him individually the right to file an individual protest. These are safeguards provided in the procedure, so that, notwithstanding the order of the Referee, there is yet open to the joint creditors or the individual creditors to file a protest against the discharge of the Bankrupt, so that if the Referee has by any imposition upon him signed such an order as that of the 23rd of September, 1935, or if the Referee has been imposed upon, misled, or any undue advantage, or any intrigue, or any fraudulent act, either on the part of the Bankrupt or on the part of the Referee, that the creditors have reserved this safeguard, that he or they may protest against the discharge of the Bankrupt. But in granting such a right to a creditor, he must come into court on the return day of the notice with his objection and his objection must be of such a character that upon its face it will appear that the Referee was misled in signing the order permitting the Bankrupt to ask for a discharge. This means that the protesting creditor must file objections, as the decisions of the Court indicate, specific in its charges as an indictment and must be verified by the individual creditor positively and not upon information and belief.

In reviewing the protest of the creditors, at this point we make the suggestion, and insist that our position is correct, that the Sun State Products Exchange protest should not have been considered by the Court and referred to the Master, Dickson, for the reason that it was filed too late. It should have been filed not later than 10 o'clock of December 2, 1935. The Court erred in referring the protest of the Sun State Produce Exchange to the Master, Dickson.

On page 31 of the transcript it recites the minutes of the Court on December 2, 1935, as follows:

> "Later, at the hour of 4:30 o'clock p. m., appearance of the Sun State Produce Exchange, objecting Creditor, by his attorney, B. W. Shipman, and the Specifications of objections to discharge are presented for filing herein, the Court orders same filed and orders same referred to the Referee, as Special Master, for hearing and report to the Court on said objections."

This, evidently, was an oversight on the part of the Court, as the hour had expired in which the Court could entertain this protest or objection.

III.

We now take up the objection of the Arizona Wax Paper Company. [Tr. pp. 23 to 36, incl.] On page 23 we call the attention of the Court to the allegation "that without four months of the bankruptcy, said Bankrupt transferred property and assets to his wife, consisting principally of moneys of the value of more than one dollar for the purpose of defrauding his then existing creditors." This objection in no manner complies with the re-

quirements or character of the objections that may be filed by a creditor against the discharge of a bankrupt. By any rule of pleading, and without any technical application of the construction of pleadings, the only conclusion that can be drawn from this objection is that four months prior to the bankruptcy petition being filed the Bankrupt gave his wife a dollar.

The next is that "subsequent to the first day of the four months" preceding the filing of the petition in bankruptcy, during the months of September, and prior to October 10, 1934, "with intent of delaying and defrauding his creditors, transferred, removed and concealed, and permitted to be removed and concealed, a portion of his property, to-wit, cash in bank and on hand, and that he transferred the same to Daisy Grande, his wife, and concealed his title thereto in said Daisy Grande's name." This is a direct charge that the bankrupt transferred cash in bank and on hand to Daisy Grande, his wife, and concealed the same in his wife's name. Now, if such a statement can be permitted under any rule of bankruptcy, any trivial objection is sufficient to defeat the discharge of a Bankrupt. If Grande had any cash in bank or on hand he could have been called before the Referee and compelled to disclose what cash he had in the bank and what cash he had on hand, and by so doing the bank could be named, the amount of cash in bank could be named, and when the same was transferred to Daisy Grande, his wife, and the charge could have been made, if it was true, specific and made to comply with the rule governing the form and character of the protest. If Grande "concealed his title thereto in said Daisy Grande's name," when was it so concealed and when was the concealment discovered, and

what action was taken on the part of the Trustee or the Referee to cause the Bankrupt to turn over this cash to the Trustee?

What is said in pointing out the insufficiency of the protest above is likewise applicable to the two following paragraphs, namely, the amount of money paid, as alleged, on the purchase of automobiles and real and personal property in the name of Daisy Grande. If there was any money paid on the purchase of automobiles, the amount could be ascertained, the automobile company could be named, and the circumstances of such transactions could be easily disclosed. The real and personal property alleged to have been purchased in the name of Daisy Grande, his wife, could be named, the amount paid, and when paid. Also, in the next paragraph, if any property was purchased in the name of Hazel D. Grande, his daughter, the property should be specifically named, when the purchase was made, and the conveyance disclosed, and it could have been easily, if true, divested from Hazel D. Grande by an order of Court against Grande and his daughter, Hazel D. Grande. But if there were any such transactions, the failure to disclose in this protest the concealment and the transaction in detail would have, upon their disclosure, defeated the very protest that is now sought to be maintained to prevent the discharge of the bankrupt, and the only construction that should have been put upon this protest of the Arizona Wax Paper Company is that the protest must be charged in general terms, otherwise if charged specifically it would clearly show that no violation of any of the bankruptcy act appeared in the details of the transactions and would have defeated the protest itself upon its very declaration of details.

On page 25 of the transcript is an acknowledgment of the execution of an instrument, rather than the verification of a complaint or petition. Recognizing the fatality and futility of this acknowledgment, on the next day Benjamin W. Shipman, attorney for the Trustee and attorney for the protestant, Arizona Wax Paper Company, on page 26 of the transcript, attempts to verify this protest. Let us analyze this verification. He says that he is attorney for the objecting creditor, Arizona Wax Paper Company; that he prepared the specification of grounds of opposition to the Bankrupt's discharge; that the copartners constituting the Arizona Wax Paper Company are not within the County of Los Angeles, and for that reason the affiant executes this verification. Then he says "the matters set forth therein appertaining to a turn-over order are true of affiant's own knowledge." Now, what does he swear to on his own knowledge. All that he swears to is that on the 4th of February, 1935, a turn-over order was made by Rupert B. Turnbull, Referee in Bankruptcy, and that he who prepared this protest attached to it a copy of the turn-over order of February 4, 1935, and then recites part of what was in the turn-over order; or, in other words, the force of his verification is simply this and this only; that the Referee in Bankruptcy made the turn-over order and that Shipman knew that such an order had been made. The other allegations, beginning in the middle of page 23 of the transcript to the concluding part on page 24, as to that portion of the protest or objection to the discharge of the Bankrupt, here is the language of Benjamin W. Shipman as to the truthfulness of these statements: "and, as to the other matters of opposition therein set forth, affiant believes them to be true"; or, in other words, the grounds upon which he bases his opposition to the discharge of the

Bankrupt, beginning in the middle of page 23 to the conclusion on page 24, and what he says therein, and he is the one who prepared it, he doesn't know anything about it and dared not swear to these alleged facts as true but sets them forth and then says, "as to the other matters of opposition therein set forth, affiant believes them to be true"; or, in other words, he doesn't know whether they are true or not. This is the very fact which prevented Benjamin W. Shipman, in preparing this objection, from specifically stating any grounds that would entitle his protest to be considered at all, because he did not know any grounds or any facts upon which to make a charge, but made them general in character, and then in his verification said he believed these matters to be true. Such protest, when tested by the requirements of the bankruptcy act and the decisions of the Court relating thereto, discloses to this Court that this procedure on behalf of the protestant, Arizona Wax Paper Company, is little less than a farce.

IV.

We have already reviewed the report of the Special Master, Hugh L. Dickson, Referee in Bankruptcy, and have pointed out decisions that are applicable to our exceptions to the report of the Special Master, beginning on page 46 and continuing through to page 60, inclusive, of the transcript, and refer to the same and refrain from embodying the same in detail in our brief, for the reason that the Bankrupt, Grande, is wholly unable to pay for any extended details, either in the transcript or the brief, and we curtail the same for that reason.

We conclude our opening brief and cite the law as we have already cited the same in our objections to the report

of the Special Master, and also as we have assigned them in assignments of error 9, 10, 11 and 12. [Tr. pp. 68 to 70, incl.]

Upon the transcript and the foregoing suggestions we submit the following errors complained of:

1. The turn-over order of February 4, 1935, was not a final order or final judgment.

2. The decision of the Judge of the District Court denying the application of the Bankrupt to be heard on review of the turn-over order was simply a declaration of the Court that we were too late. That decision, however, did not add any force to the turn-over order which would make it a final judgment.

3. The order of September 23, 1935, authorized the Bankrupt to proceed with his petition for discharge, and in so doing declared that he had done no wrong and had complied with all the rules required of him as a Bankrupt.

4. The protest or objection to the discharge by the Sun State Produce Exchange cannot be heard by this Court or given any consideration whatever, for the reason that the District Court had lost any right to consider the same, the objection and protest not having been filed until 4:30 p. m. on December 2, 1935, when it should have been filed at 10 a. m.

5. The protest of the Arizona Wax Paper Company totally fails to comply with the rule of procedure and the decisions of the Court with respect to the allegations of what the protest should contain; no specific charges are made against the Bankrupt that should prevent him from being discharged.

6. That Benjamin W. Shipman appeared in the bankruptcy procedure as attorney for the Trustee, and hav-

ing been so appointed he could not appear as special attorney or private attorney for any one of the creditors and at the same time act as attorney for the Trustee. As attorney for the Trustee he was to appear impartially for the benefit of all the creditors and to treat the Bankrupt with fairness. Having filed as attorney for both claimants, Sun State Produce Exchange and the Arizona Wax Paper Company, claims against the Bankrupt, he became special attorney for these two creditors, whose interest must of necessity conflict with his general appearance for all the creditors; or, in other words, he was attorney for all the creditors, generally, representing the Trustee, including both the Arizona Wax Paper Company and the Sun State Produce Exchange. In addition to that he was special attorney for these two protesting creditors. The Trustee, under the law and under the citations that we have made under the law, could not appear as protestant without the unanimous consent of all the creditors. If the Trustee could not appear for individual creditors as a protestant against the discharge of the Bankrupt, then his attorney could not so appear; hence, the Arizona Wax Paper Company could not, and Shipman could not enter himself as special attorney for a protesting creditor under the conditions as above stated.

With the foregoing we respectfully submit that the decision of the District Court of the United States for the Southern District of California, Central Division, be reversed and the findings of the Special Master be set aside and the Bankrupt's petition for discharge be granted.

Respectfully submitted,

JAMES DONOVAN,

Attorney for Appellant.

APPENDIX.

JURISDICTION OF THE COURT.

General Bankruptcy Act, U. S. Statutes.

Petition for discharge, amendment April 24, 1933.

110 Fed. 109.

Equity Rules XX to XXV.

"Appeal shall be regulated, except as otherwise provided in the act, by rules governing appeals in equity in courts of the United States."

Amendment of April 24, 1933.

CASES CITED.

Assignment of Error IX: [Tr. p. 68; see Appendix.]

Bankruptcy Act, Sec. 14b (4).

Collier's Bankruptcy Procedure (13th ed.) Vol. 1, Sec. 14, page 493.

250 Fed. 1005,

96 Fed. 468,

248 Fed. 115.

Assignment of Error X: [Tr. p. 68 (See Appendix)].

Collier's 13th Ed. Vol. 3, p. 2548, Form No. 326.

140 Fed. 222,

173 Fed. 484,

Collier's 13th Ed. Vol. 1, p. 498, sub-section 14-b.

93 Fed. 440,

140 Fed. 222,

197 Fed. 648, [Tr. pp. 68, 69; see Appendix.]

Assignment of Error XI:

"Neither should the new master use the record of the referee upon which to base his findings."
162 Fed. 983 [see Appendix].

Assignment of Error XII:

"Ordinary rules of evidence control. Evidence will be confined to the specifications and objections."
268 Fed. 1006,

Collier's 13th Ed., Vol. 1, p. 511, Sec. 14 (3).

Collier's 13th Ed., Vol. 1-b, 520.

Under the opposition to discharge of the bankrupt, the following as to the time at which the objection to the discharge should be filed.

See:
130 Fed. 627,
108 Fed. 199.

The appearance of creditor opposing a bankrupt's discharge must be entered on the day when the creditors are required to show cause:

130 Fed. 889,
162 Fed. 912.

A failure to enter an appearance on the return day precludes the objecting creditor from filing exceptions to his discharge thereafter, even though they be filed within ten days. A creditor opposing the discharge has the duty of alleging sufficiently specific grounds of such opposition and the burden of proving them.

Holman, In re, 92 Fed. 512.

See:
104 Fed. 974,
109 Fed. 967.

ASSIGNMENT OF ERRORS.

I.

The Court erred in ordering a reference to Hugh L. Dickson, Referee in Bankruptcy, on December 2, 1935, on the following grounds:

A. That the Arizona Wax Paper Company and State Produce Exchange were the only creditors who filed objections to the discharge of Joseph H. Grande, Bankrupt.

B. That Benjamin W. Shipman is and was at all times since the Trustee in Bankruptcy was named attorney for the Trustee, William I. Heffron.

C. That said Shipman filed each of these claims as attorney for creditor before the Referee in Bankruptcy, as attorney for said creditor.

D. That on December 2, 1935, said Shipman filed each of these protests against the discharge of the bankrupt as attorney for each of said protesting creditors and verified one of the protests.

E. That there is no specific allegation in either of said protests of the Arizona Wax Paper Company or State Produce Exchange sufficient to justify the Court to refer the same to a Referee.

II.

That the Court erred in sustaining the report of the Referee in Bankruptcy, Hugh L. Dickson, in this:

A. The report shows that the Referee adopted a certain finding of his predecessor of date of February 4, 1935, without any evidence being offered covering the subject matter of said report of February 4, 1935 of his predecessor, Referee Turnbull, without giving the Bankrupt an opportunity to have investigated by Referee Dick-

son, the facts upon which the report of Referee Turnbull was made on February 4, 1935.

III.

The Court erred in sustaining the Referee's Report when there was no specific charge upon which the Master would be authorized under Section 14-b (4) of the Bankruptcy Act to act.

The Court erred in sustaining the Master's Report in this:

A. When the objection to the ground upon which the protests were made was not specifically charged.

B In sustaining the Special Master's report in reciting what his predecessor, Turnbull, as referee found in the case, for no specific charge is made upon which this finding of Referee Turnbull could be predicated.

C. In sustaining the Special Master's finding as follows: Then this Master further finds: "It was found that, within eleven months prior to the filing of the voluntary petition in bankruptcy, the bankrupt herein transferred, assigned and set over, without consideration, automobiles, cash, merchandise, leases and contracts, to said corporation, Grande-California, Inc. That, at said time, said bankrupt had many and extensive debts and at least one judgment against him." This quotation discloses that instead of the Special Master hearing evidence and making his own findings, as directed by the Court, without any evidence he adopted the above quotation as a part of the finding of his predecessor, Turnbull.

D. There was no evidence offered before the Special Master to sustain the quotation of his predecessor as a part of his duty as such Special Master.

E. It was not within the jurisdiction of the Special Master to review the report of his predecessor. He was not called upon for such purpose and it was not within his jurisdiction.

IV.

The Court erred in sustaining the Referee's Report in this:

A. There was no evidence offered, or any witnesses called on behalf of the protestants. The only person present representing the hearings before the Special Master was Attorney Shipman who offered no evidence to sustain the specific charges in the protests.

V.

The Court erred in sustaining the Referee's Report in this:

A. In reviewing the former findings of Referee Turnbull the Special Master quoted the following:

"It was further found in said proceedings, (referring to the proceedings in bankruptcy), in which said findings and order have become final, that said corporation, to-wit: Grande-California, Inc., was caused to come into being and to exist for the sole purpose of permitting the said bankrupt to do business without being hindered by his creditors,"

The Special Master further found, quoting from findings of Referee Turnbull:

"It was further the conclusion of the court from the facts and the evidence that said Grande-California, Inc., was the *alter ego* of Joseph H. Grande."

Quoting again from the findings of Referee Turnbull, the Special Master quotes:

"The aforesaid findings and order were introduced in evidence, together with the file appertaining to the above entitled case."

VI.

The Court erred in sustaining the Referee's Report in this:

A. The report of Special Master, Dickson, as the evidence or the facts upon which the Special Master drew his conclusions was not before the Court and the record that was before the Court disclosed that there was no independent investigation made by the Special Master upon which to base his findings.

B. The Special Master used this language in one of his findings:

"The testimony of the bankrupt throughout the proceedings showed an entire lack of good faith and desire on the part of the bankrupt to tell the truth about his financial affairs. Etc."

C. The Special Master was not called to review the action of his predecessor, Turnbull, or to in anywise pass judgment upon the conclusions reached by the Referee Turnbull.

VII.

The Court erred in sustaining the Referee's Report in this:

A. The erroneous conception of the Special Master as to what his duties were and to his appointment.

B The Special Master assumed that he should pass upon the credibility of the record of his predecessor as a proper procedure under the order under which he was acting.

C. It was not the duty of the Special Master to determine whether the order made by Turnbull on February 4, 1935, was a final order.

VIII.

The Court erred in sustaining the Referee's Report in this:

A. In sustaining the report of the Special Master when the record does not disclose there was any evidence offered or before the Special Master to sustain the allegations in the protests for discharge showing, or tending to show, that any automobile, cash, merchandise, leases or contracts, or any one or all of them, were concealed, converted to, or hidden from the Trustee or that any such property mentioned ever existed at all which could be diverted from the Trustee.

IX.

The Court erred in passing upon the Appeal from the Special Master in ignoring the law applicable to the procedure in this case.

A. In Colliers Bankruptcy Procedure, 13th Edition, Vol. 1, Sec. 14, page 493, construed in 250 Fed. 1005 and in 96 Fed. 468, the Court said:

"No other creditor can file, nor can one filing speak for the others; each protesting must file specific objections and he can speak for himself alone."

In construing this section in 248 Fed. 115, the Court said:

"The Trustee could not appear as a protestant against the discharge of the bankrupt, unless authorized by all of the creditors."

B. In permitting Benjamin W. Shipman to appear in behalf of protestants as their attorney when he was still of record as the attorney for the Trustee.

X.

The Court erred in not following the rule of law announced on page 2548, Colliers 13th Edition, Vol. 3, form No. 326, which is construed in 140 Fed. 222 and 173 Fed. 484 in which the form of protest to the discharge of the bankrupt is pointed out and the necessity for specific charges. On page 498, volume 1, Colliers 13th Edition, Section 14-b (4) it reads:

"Allegations sufficient to show that all essential facts existing bring the opposition within the grounds specified by the statute, * * * they should be pleaded with greater particularity than complaints in civil actions; indeed, they more nearly resemble indictments." 93 Fed. 440.

"More general averments are not sufficient." 140 Fed. 222, 197 Fed. 648.

"Referee as Master should not base a finding upon original examination of the bankrupt before him as a referee."

XI.

The Court erred in sustaining the report of Special Master Dickson wherein it is shown that Special Master

adopted as evidence in this case the findings made by the Referee, Turnbull, on February 4, 1935.

"Neither should the new Master use the record of the Referee upon which to base his findings." 162 Fed. 983. And the

"Special Master should not report upon questions presented by the specifications of objections to a discharge without having examined and heard the testimony. For the presence of the witnesses in a contested controversy is vital to the proper determination."

XII.

The Court erred in failing to follow Section 14 of Colliers as above quoted, under the set of rules of evidence, proof required, this rule is laid down:

"The ordinary rules of evidence control. Evidence will be confined to the specifications and objections." 268 Fed. 1006.

"The burden of proof is upon the opposing creditor." Page 511, Vol. 1, Sec. 14 (3).

Then the following subdivisions must be established by the protesting creditor:

1. Concealment of assets must be specifically charged and proven.

2. Evidence of false oath must be clearly charged and proven, as in any other case. If the charge of perjury is made it must be supported by additional circumstances and one witness. Suspicious circumstances will not justify opposing the discharge of a bankrupt.

3. Page 520, Vol. 1-B. Commission of a crime other than those mentioned in Section 29 are not grounds for denial of bankrupt's discharge.

No. 8411.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

16

In the Matter of
JOSEPH H. GRANDE,
Bankrupt.

Joseph H. Grande,
Appellant,

vs.

Arizona Wax Paper Company and State Produce Exchange,
Appellees.

APPELLEES' BRIEF.

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Attorney for Appellees.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

Text Books and Encyclopedias.

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APPELLEES' BRIEF.

Appellees herein are certain objecting creditors to the petition for discharge presented by the bankrupt herein. They have filed objections to the bankrupt's (appellant herein) petition for discharge and, though there were two objections, they were referred to the same Master and heard at one time. The specifications in each objection are practically identical. The record does not disclose that the appellant objected to the sufficiency of the charges

therein made before hearing on the merits, and it appears from the Master's report that hearing was had upon each of the objections. [Tr. of Rec. pp. 32-44.]

Some confusion may exist on our part in that the notice of appeal appearing on page 62 of the transcript of record indicates that the present appeal was from the order and decree of September 15, 1936, which, of course, is the order overruling the objections of the bankrupt to the report of the Referee and Special Master and denying the petition for discharge.

Appellant, however, on page 7 of his brief, states, after a recital of the matters which purport to constitute the statement of facts, that, upon the foregoing facts, he appeals and "bases his right to have the rulings of the Referee in Bankruptcy, Special Master, and the rulings of the United States District Court reversed and set aside and the bankrupt discharged", thus, apparently, laboring under the task of reexamining the entire issue whatever may be its judicial status.

Though it is possible that appellant's brief is confusing only to us, we have felt it beneficial to assume the liberty of stating the facts as chronologically as possible, having due regard to their actual proof and existence, to determine the possible questions that can be considered, and we respectfully set forth the following:

Statement of Facts.

In October of 1934, the bankrupt herein filed his petition for voluntary adjudication as bankrupt, which was granted. His trustee was elected, who proceeded with the administration of the estate. Thereafter, in the course of such proceedings, the trustee filed a petition against the bankrupt, a corporation conducted as Grande-California, Inc., and other persons, seeking a turnover order from the bankruptcy court as to all of the property and assets in the name of Grande-California, Inc., claiming that said corporation was but an *alter ego* of the bankrupt and that it was organized for the purpose of concealing the assets of the bankrupt. A hearing was had thereon and a turnover order was issued under date of February 4th, 1935, in the form of findings and order. This sets forth the fault found by the Referee with the petition for such turnover order, as originally filed, and that a new petition has been filed and a hearing had upon stipulation of the parties, and the Referee then made findings, conclusions and an order, from which it appears that, on March 2, 1934, the particular corporation was organized and there was transferred to it by the bankrupt, without consideration, automobiles, cash, merchandise, leases and contracts. That, at the time, the bankrupt had many and extensive debts and he was being pressed for the payment thereof, and that the transfer was for the purpose of preventing the creditors from collecting their accounts against him and also for the purpose of hindering, delaying and defrauding his creditors.

The Referee then found that the corporation was caused to come into being and to exist solely for the purpose of permitting the bankrupt to do business without being

hindered by his creditors and for the purpose of permitting him to retain possession of his property under the name of the corporation.

The Referee then concluded that the bankrupt was the sole owner of the capital stock of the corporation and all of its assets and that the property should have been turned over to the trustee in bankruptcy by the bankrupt at the time that he was adjudicated upon his voluntary petition. [Tr. pp. 3-7.]

Under the rules of the United States District Court in and for the Southern District of California, where the petition was filed, Rule 84 provides as follows:

> "Rule 84.—REVIEW OF REFEREE'S ORDERS.
>
> A petition for a review of an order made by a Referee as provided in General Order No. XXVII of the General Orders in Bankruptcy must be filed with the Referee within ten days from the date of notice of such order. The Referee may require to be paid in advance in addition to the costs referred to in Rule 81, his actual expense in making a summary of the evidence.
>
> For good cause shown, the Referee may at any time within said period of ten days, extend the time an additional thirty days within which a petition for review may be filed."

On or about the 21st day of February, 1935, a motion and order to show cause was made and obtained by the bankrupt, which, upon hearing thereof, was considered as a motion to be relieved of default and to have the order reviewed. The order to show cause was returnable on

February 25, 1935. Thereby the bankrupt sought to be relieved of default in seeking a review of the order.

Thereupon, the Court denied the relief sought by the bankrupt and particularly stated, in the course of the written opinion, that, considering the merits of the case, it was not apparent that injustice would result to the bankrupt by the enforcement of the order and that there was no conflict as to the fact that the corporate entity was but a vehicle used by the bankrupt for the conduct of his business, and the corporation was his *alter ego*. The Court, in concluding the opinion, also expressed itself to the effect that the showing as to mistake of counsel was not sufficient to justify the relief sought by the bankrupt and that, assuming the omission to take the review within the time provided by the rule was excusable, there was not sufficient showing of error therein. [Tr. pp. 16-17.]

It is clear, therefore, that in denying the motion or petition of the bankrupt, the Court considered, not only the propriety of relieving the bankrupt of default, but also the possibility of disturbing the conclusions of the Referee upon review.

Exception was noted to the ruling of the Court. The ruling was made on February 27, 1935, and no appeal therefrom was had and the order was not in anywise modified or changed.

Thereafter, on September 23, 1935, the Referee in Bankruptcy (and being the same Referee that made the order of February 4, 1935, above referred to) issued to

the bankrupt a certificate of compliance, appearing on page 18 of the transcript.

Thereafter, on the 8th day of October, 1935, the bankrupt presented his petition for discharge.

Under the rule of the District Court in which the bankruptcy proceedings were pending, it is provided, in part, as follows:

> "Rule 78.—Discharge, Composition and Certificate of Compliance on Discharge.
>
> "The petition for a discharge, or for a confirmation of a composition, must be filed with the clerk of the court. The petitioner shall file with his petition (or within such further time as the court shall allow) a statement of the Referee to whom the case shall have been referred, showing that the bankrupt has in all things conformed to the requirements of the Bankruptcy Act and has committed none of the offenses and done none of the things prohibited by said Act. It shall be the duty of the Referee to furnish such statement upon demand of the bankrupt. If the Referee cannot make a statement favorable to the bankrupt, he shall, nevertheless, inform the court in the statement required to be furnished, specifically as to the facts upon which his refusal is based so that the court may take such action as it may deem necessary before allowing the discharge.
>
> "No order to show cause why a discharge should not be granted in a bankruptcy matter shall be placed upon the calendar for hearing until the Referee's cer-

tificate of compliance or the Referee's statement of facts hereinbefore provided to be made, and the affidavit of publication and proof of mailing notices to creditors shall have been on file in the clerk's office for five days prior to the date of hearing.

"All applications for discharge shall be heard on the first Monday of each month."

Thereupon, on the 2nd day of December, 1935, the appellees herein filed their appearances and objections to the bankrupt's discharge. The objections particularly state that, within the statutory period, the bankrupt transferred and concealed property with the intent to hinder, delay and defraud his creditors; this was followed by the allegation of the transfer and concealment of the assets of the bankrupt to the corporation, and was based extensively on the findings and order of the Referee dated February 4th, 1935, and a certified copy of the order was attached to the objections and was made a part thereof; that the order had become final. The objections were filed by the objecting creditors (appellees herein) and both were filed on the 2nd day of December, 1935, were filed in sequence, but were referred to the same Master on the 2nd day of December, 1935, and a hearing was had thereon.

The Special Master found in accordance with the allegations of the objections to the discharge of the bankrupt, and found that the findings and order of February 4, 1935, have become final; that the findings and order were

a part of the file of the proceedings had in the bankruptcy proceedings of the appellant herein. Then as to the other matters alleged in the objections (that is, that within four months of the bankruptcy, the bankrupt transferred property and assets, of the value of more than one dollar ($1.00), to his wife, particularly during the month of September, and prior to the 10th day of October, 1934, for the purpose of delaying and defrauding his creditors, and that he has transferred and concealed and permitted to be transferred and concealed a portion of his property, consisting of cash on hand and in bank, and that he transferred it to his wife and concealed it in her name), the Special Master found that, the adjudication took place on the 10th of October, 1934; that on the preceding day, the bankrupt gave and transferred to his wife $1395.00 and, on the day of the bankruptcy, he gave his wife $750.00; that, when the bankrupt was questioned regarding these transfers to his wife, he gave no explanation of his act and claimed that he did not remember the occurrence. The Master, further, shows unsatisfactory testimony of the bankrupt during bankruptcy proceedings and cites inconsistencies in the written testimony adduced. No showing, of course, has been made that the testimony of the bankrupt was in anywise improperly before the Court.

The Special Master then concludes as to the status of the objecting creditor; the finality of the judgment of February 4, 1935; that each objecting creditor is a creditor of the bankrupt and was a creditor at the time of

the filing of the petition and can maintain and present the objections; also that the acts took place within the period specified by paragraph 14-b (4) of the Bankruptcy Act. The Special Master recommended the denial of the petition for discharge. [Tr. pp. 32-44.]

The trustee did not appear in the proceeding had.

Thereupon, a document was filed by the bankrupt entitled "Appeal of Bankrupt—Exceptions to Report of Special Master", the first specification appertaining primarily to the appearance of counsel for the trustee in the proceedings before the Special Master as attorney for the objecting creditors. These purported objections to the Master's report contain this language, as it appears on page 47 of the transcript:

> "On the report of the Referee as Special Master, a trial was had of the issues raised by the bankrupt petition of discharge and objections thereto filed by the objecting creditor etc. Evidence both oral and documentary was presented and submitted to the Special Master; the evidence being closed the cause was submitted to the Special Master for his report, findings and determination. The Referee, as Special Master, reports as follows: * * *."

Hearings were had on the objections to the Master's Report and, on the 15th day of September, 1936, the Court held that the objections of the bankrupt to the report of the Referee and Special Master be overruled and that his petition for discharge be denied. [Tr. p. 61.]

Statement of Points Apparently Urged by Appellant and Argument Thereon.

I.

It would appear from the appellant's statement of points involved in the appeal, and set forth on page 21, that the turnover order of February 4, 1935, is not final and apparently can be examined in this proceeding. Even if it were so (and this in view of the authority which we cite below is even unthinkable), we cannot see what is to be used as a criterion of reexamination of this order, as upon its very face it is shown that it is the result of evidence adduced before the Referee, the evidence has not been brought up, and no application for permission to appeal therefrom has been made to the Circuit Court of Appeals.

The sole basis of exception to the order is that appellant rather unfairly takes one portion thereof (on page 10 of the brief), wherein the order specifically shows that no person invested any money in the corporation, and adopts this, so to say, as his text, without giving heed to what precedes and follows, and that this statement of the Referee is but an exemplification of the fact that the corporation was a creature of the bankrupt for the benefit of the bankrupt and as a vehicle of fraud to be used against the creditors of the bankrupt.

The virtual review of February 27, 1935, by the District Judge is dismissed by appellant with the simple statement that it was simply a determination that the appellant

was too late to secure the relief sought, though the opinion states that the nature of the corporate entity and its purpose was not questioned, and further states that a consideration of the matters that have come before the Court would not justify the Court to disturb the order of the Referee.

II.

Then the appellant apparently endeavors to find solace in the certificate of compliance issued to the bankrupt on September 23, 1935. It is evident, however, under the rule of the District Court in which the cause was pending, that a certificate was necessary in order to permit the bankrupt to file a petition for discharge. It apparently is an *ex parte* order which cannot in anywise disturb an order that has become final and conclusive as, given its greatest scope, it afforded the appellant the privilege to put into issue his right to a discharge and to ask the Court for a ruling thereon. This he did, and objections thereto were made and sustained.

III.

Then the appellant urges that one of the creditors filed the objections at ten o'clock in the morning and the other at 4:30 o'clock in the afternoon, all, however, of the same day upon which the hearing was to be had. Wherein this in anywise conflicts with General Order No. XXXII is rather difficult to understand. Apparently no objection has been made thereto by the appellant before the reference or at time of hearing of the reference, and the refer-

ence proceeded without the benefit of having presented, either to the Master or to the Court, the objections thus discovered by the appellant. The appearance and objection, according to the position of the appellant himself, were on the day specified by General Order No. XXXII.

IV.

The next point urged by the appellant is some deficiency in the specifications of objection of the appellee Arizona Wax Paper Company, without clearly stating in what manner it so fails.

The record does not disclose any attack upon it as a pleading, and, of course, it is but a familiar rule of pleading that pleadings are always aided by the judgment rendered by the Court after hearing. It is significant that the hearing had before the Special Master produced the result prayed for in the objections and that the action of the Special Master, upon review, has been sustained by the District Judge. The presumptions arising therefrom shall be discussed later.

V.

The next point of attack, apparently, is that the bankrupt in some manner is affected by the appearance of the attorney, who was also the attorney for the trustee, as attorney for the objecting creditors.

It is evident from the record, however, that the trustee is not a party to the proceeding. Thus, the question as to whether the trustee has been authorized to object to the discharge at a meeting of creditors, as provided by

the act, does not in anywise enter into the consideration. Wherein, therefore, an undue or improper burden has been placed on the appellant, we cannot say.

To dispose of any questions raised or involved by this appeal, we present these points to the Court:

1. The Order of February 4, 1935, Is a Final Order, Cannot Be Attacked Collaterally, and Is Not in Anywise Affected by the Subsequent Certificate of September 23, 1935.

2. Objections of the Appellee Creditors Have Been Filed in Pursuance to General Order No. XXXII.

3. The Order of February 4, 1935, Establishes the Presence of One of the Grounds Specified by Section 14 of the Bankruptcy Act Under Which the Discharge Must Be Denied.

4. Prior Determination of Concealment Is Conclusive in All Subsequent Proceedings.

5. It Was Within the Inherent Power of the Court to Take Judicial Notice of the Existence of the Order of February 4, 1935.

6. Findings of a Special Master or Referee Approved by the District Court Are Conclusive of the Question of Fact and Will Not Be Disturbed Except in Case of Gross Error.

1. The Order of February 4, 1935, Is a Final Order, Cannot Be Attacked Collaterally, and Is Not in Anywise Affected by the Subsequent Certificate of September 23, 1935.

Throughout appellant's brief, statements can be found that the order of February 4, 1935, is not a final order. We are not given the benefit of any reason therefor. Looking at the pronouncement of the District Judge of February 27, 1935, it is evident that the scope of inquiry regarding the propriety of granting the remedy to the appellant at that time was fully equal to that of a review, in that the District Judge states that in his opinion, the fictitious character of the separate entity was admitted and that the facts presented to him did not justify a different conclusion than that arrived at by the Referee.

The extent of the finality of a turnover proceeding is discussed in *Page v. Arkansas Natural Gas Corp.*, 286 U. S. 269, 272, 52 S. Ct. 507 (76 L. Ed. 1096).

The case deals with the order of a referee in bankruptcy, ordering the execution of a conveyance. The order of the referee was affirmed by the District Court. The Court before whom the cause was pending prior to its review by the United States Supreme Court held that the referee had the power to make the order, particularly because the person affected thereunder submitted to the jurisdiction of the referee; in the proceeding resulting in the appeal, it was sought to relitigate the issues which resulted in the order of the referee ordering the execution of the conveyance. The Supreme Court, on page 272, says:

> "The order of the referee, in the bankruptcy proceeding, affirmed by the District Court, therefore ad-

judicated those issues between the parties and they may not be relitigated in the present suit by their successors in interest."

Chief Justice Taft considered the nature of a turnover order in the course of a contempt proceeding, where, of course, any attack was considered with even greater latitude than that permitted in a civil proceeding, and states as follows:

"The charge upon which the order is asked is that the bankrupt, having possession of property which he knew should have been delivered by him to the trustees, refuses to comply with his obligation in this regard. It is a charge equivalent to one of fraud and must be established by the same kind of evidence required in a case of fraud in a court of equity. A mere preponderance of evidence in such a case is not enough. (363) The proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed. The referee and the court, in passing on the issue under such a turnover motion, should, therefore, require clear evidence of the justice of such an order before it is made. Being made, it should be given weight in the future proceedings as one that may not be collaterally attacked by an effort to try over the issue already heard and decided at the turnover. Thereafter on the motion for commitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made, showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order.

"The proceedings in these two cases have been so long drawn out by efforts on the part of the bankrupts to retry the issue presented on the motion to

turnover as to be, of themselves, convincing argument that if the bankruptcy statute is not to be frittered away in constant delays and failures of enforcement of lawful orders, the rule we have laid down is the proper one. * * *

"The conclusive effect in a proceeding of this sort of an order of 'turnover' finds its analogy in the inquiry in contempt proceedings for violating an injunction issued by a court of general jurisdiction. Howat v. Kansas, 258 U. S. 181, 66 L. Ed. 550, 42 Sup. Ct. Rep. 277; * * *."

Oriel v. Russell, 278 U. S. 358, 73 L. Ed. 419, (pages 424, 425), 49 Sup. Ct. Rep. 173.

The appellant in the course of his discussion seems to be of the opinion that something can be gained from the recitals of the certificate of compliance of September 23, 1935. This certificate of compliance has been issued apparently in pursuance to the rule of Court; we know of no provision of the Bankruptcy Act requiring it. The benefit thereof, then, that inured to the bankrupt was that his petition for discharge could be filed and considered by the Court. Whether the District Court did have the inherent rule-making power to deny the bankrupt here the right to be heard upon a petition for discharge without a certificate is not involved here. His right to have his petition heard was not in anywise impeded nor does it add anything to the position of the bankrupt, as the order of February 4, 1935, had become final long before the end of September, 1935, and the Referee has no power left over it, whether *ex parte* or otherwise.

This Circuit Court has expressed itself heretofore as to Referee's right over orders.

Re Faerstein, 58 Fed. (2d) 942;

Patents Process v. Durst, 69 Fed. (2d) 283;

the *Faerstein* case also embodying a turnover order.

2. Objections of the Appellee Creditors Have Been Filed in Pursuance to General Order No. XXXII.

The reason for the amendment to General Order No. XXXII, particularly and pertinently, is discussed in the case of *Lerner v. First Wisconsin Nat. Bank,* 294 U. S. 116, 55 S. Ct. 360, 79 L. Ed. 796, from which we take occasion to quote below.

In the case at bar, the appearances of the objecting creditors and the objections to the discharge were all filed the same day. The rule specifically states that they must be filed the day fixed for the hearing of the petition for discharge. The two sets of objections were referred to the same Special Master for hearing and it is apparent from the record brought up by the appellant herein that, when the first appearance and objection were filed, reference was had to a Special Master, thus indicating that the Court was not going to hear the objection on said day. When the second appearance and objection were filed, they were referred to the same Special Master the same day, and subsequently heard at the same time as the first objection in point of filing. Wherein any damage or detriment has been suffered by the appellant is not apparent.

It is also proper to note, in considering the plaint of the appellant, that issue relative to the filing of the appearances and objections first arises on appeal, and that appellant went to trial and had a hearing and trial before the Special Master, made exceptions to the Special Master's report, which was confirmed, and only now asserts noncompliance with General Order No. XXXII.

The pertinent portion of *Lerner v. First Wisconsin Nat. Bank,* is as follows (p. 798):

> "The language of the amended order is mandatory; it is controlling in circumstances like those here presented; strict compliance should be accorded. Under Order XXXVII, and permissive provisions of the Bankruptcy Act, we think the courts may exercise discretion sufficient for the successful conduct of proceedings in varying circumstances. Thus, while an objecting creditor must file specifications showing the grounds of his opposition on the day when creditors are required to show cause, that day may be fixed or postponed by the court in view of the existing situation."

It clearly indicates that it was proper for the court to arrange its business in the manner before us.

Remington on Bankruptcy, Vol. 7, paragraph 3383, discusses the pertinent situation that, where the bankrupt goes to trial on the merits without objection, waiver of any defects in specifications would result.

3. The Order of February 4, 1935, Establishes the Presence of One of the Grounds Specified by Section 14 of the Bankruptcy Act Under Which the Discharge Must Be Denied.

Section 14 (b), subdivision 4, of the Bankruptcy Act, one of the grounds barring discharge, reads as follows:

> "(4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors;"

But a slight comparison will disclose the presence of each one of these elements in the findings and order of February 4, 1935; in fact, the requisite elements could not be set up with any greater clarity and conformance than evidenced by the turnover order. The nature of concealment is evident—there is no escape therefrom—and forms an occurrence which the act clearly prohibits, and to the perpetrators of which it directs the denial of a discharge.

4. Prior Determination of Concealment Is Conclusive in All Subsequent Proceedings.

Appellant, further, is precluded in this appeal because it has been repeatedly held that determination in the course of the bankruptcy proceedings that the bankrupt has concealed property from his trustee is a conclusive bar to his discharge.

Sawyer v. Orlov, 15 Fed. (2d) 952;

In re Breiner, 129 Fed. 155;

In re Sussman, 190 Fed. 111;
Grafton v. Mecklehan, 246 Fed. 737;
In re Craill, 196 Fed. 402;
In re Arnold, 1 Fed. Supp. 499.

The case of *Sawyer v. Orlov,* 15 Fed. (2d) 952, deals with an appeal by an objecting creditor from an order of Court granting a discharge. There a creditor objected to the discharge and in his specifications stated that, within four months of the bankruptcy the bankrupt transferred to a corporation, organized by him and owned by him substantially, all of his merchandise with the intent to hinder, delay and defraud.

The referee, in his report on the petition for discharge, stated that the question had been previously presented to him, the same objection was made to the composition, and at that time he (the referee) found that the transfer had been made and that it was for the purpose of hindering, delaying and defrauding the creditors.

The District Court entered a decree denying the petition for composition. The referee, in his report upon the objections to the discharge, reported further that, subsequent to the denial of the composition, a suit was brought in the District Court by the trustee to set aside the same transcript in which it was found that the bankrupt did not act with conscious fraudulent intent in making the transfer and thereupon the referee further stated that, in deference to the conclusion of the District Court, although

it was opposed to his own decision previously rendered, he recommended the discharge. The District Court ordered the discharge; the objecting creditor appealed.

In the assignment of errors, the appellant assigned as errors the consideration of the decree in the other suit (that is, the suit concerned with the setting aside of the transcript), and in not holding that the decree affirming the referee's report was a final adjudication of the question of fraud involved. The Court, in decreeing a reversal of the decree of the District Court, states as to these assignments:

> "(1) The first assignment must be sustained. It was wholly irregular for the referee to take into consideration the finding of the District Court in another suit between different parties.
>
> "(2) The second assignment likewise must be sustained. The finding of the referee in the composition proceeding, that the bankrupt made the transfer to the corporation with the 'deliberate intent to defraud his creditors,' affirmed by the decree denying composition, was a conclusive determination of these facts as between these parties when called in question in the subsequent proceeding for discharge to which they were likewise parties. Sutton v. Wentworth, 247 F. 493, 501, 160 C. C. A. 3; Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Southern Pacific Railroad v. United States, 168 U. S. 1, 57, 59, 60, 18 S. Ct. 18, 42 L. Ed. 355."

Sawyer v. Orlov, 15 Fed. (2d) 952.

5. It Was Within the Inherent Power of the Court to Take Judicial Notice of the Existence of the Order of February 4, 1935.

In view of the fact that the proceedings culminating in the denial of discharge to the bankrupt are predicated upon the turnover order above referred to, it becomes evident that the order was a part of the case before the Referee and was also a part of the case before the District Judge and, on December 2, 1935, this order occupied the position of being a final order and, being an order of the type which "was a prior determination of concealment" was conclusive in all subsequent proceedings. The usual requisite of judicial notice which we must impute to the Court in all stages of the proceedings would under the aforesaid authority preclude the discharge of the bankrupt without any further action on the part of any creditor and the objections of the opposing creditors were, so to say, but a suggestion of the Court of the existence of the record.

A somewhat analogous situation was considered by the United States Supreme Court in the case of *Freshman v. Atkins,* 269 U. S. 121 (46 Sup. Ct. Rep. 41), 70 L. ed. 193. There no appearance at all was made for the respondent on appeal. The bankrupt, in the course of this proceeding, applied for a discharge; the Referee reported to the Court adversely. After a lapse of years, the bankrupt instituted a new proceeding in bankruptcy and again petitioned for discharge and the Court took judicial notice of the prior and separate proceeding, and the Court, speaking of the matter, in the course of its opinion states as follows:

> "In such a situation the court may well act of its own motion to suppress an attempt to overreach the

> due and orderly administration of justice. What is said in the Fiegenbaum case, 57 C. C. A. 409, 121 Fed. 70, is appropriate here: 'Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, *in limine,* so flagrant an attempt to circumvent its decrees.' There is nothing in Bluthenthal v. Jones, 208 U. S. 64, 52 L. ed. 390, 28 Sup. Ct. Rep. 192, to the contrary."

It is true that the opinion apparently concedes, for the purpose of argument, that such action by the Court should not be taken *"ex mero motu",* but apparently this language appertains to the fact that, in that case, there were two separate proceedings, and it is our understanding of the rule of judicial notice that it appertains solely to the case at bar.

In the instant proceeding, of course, the turnover order appertained to the same file which was before the District Judge on December 2, 1935, and, therefore, falls so peculiarly within that class of judicial notice which is so well described in *23 Corpus Juris,* pages 110 and 111:

> "(1918) bb. In Same Case. In a case on trial in any court its records are actually or constructively before the judge. He will therefore take judicial notice of them and the facts which they establish, as in dealing with pleas in abatement, motions to dismiss, or for a new trial based upon defects in the record, including facts as to the action of the court, or of the judge on a former hearing, and what such records show regarding the proceedings of commissioners which are under review."

6. Findings of a Special Master or Referee Approved by the District Court Are Conclusive of the Question of Fact and Will Not Be Disturbed Except in Case of Gross Error.

The facts here disclose a reference, a hearing upon the objections of the opposing creditors, a report of the Special Master, and the concurrence in the report of the Special Master by the District Court after hearing upon objections made by the appellant to the report of the Special Master.

It, thus, is apparent that the cause falls within that class of cases wherein this Circuit Court has expressed itself in the case of *Ott v. Thurston,* 76 Fed. (2d) 368, quoting from O'Brien's Manual of Federal Appellate Procedure. Mr. O'Brien, in his book, quotes the following (pages 72 and 73):

> "The Court of Appeals for the Ninth Circuit quotes with approval the language of Remington on Bankruptcy, footnote to Sec. 3871, 4th Ed., Vol. 8, p. 227:
>
> 'And it is especially true that the reviewing courts will not disturb findings of fact except for manifest error, where both the referee and the district judge have coincided.'
>
> And the findings of a chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact."

This rule has been followed by this Circuit Court in the following cases:

Neece v. Durst, etc. (C. C. A. 9), 61 F. (2d) 591;

Woods v. Naimy (C. C. A. 9), 69 F. (2d) 892, 895;

Swift, etc. v. Higgins, etc. (C. C. A. 9), 72 F. (2d) 791;

Exchange Nat. Bank of Spokane v. Meikle, (C. C. A. 9), 61 F. (2d) 176, 179;

and in one of the cases above (i. e., *Exchange Nat. Bank of Spokane v. Meikle, supra*), this Court has said:

> "The record shows that the testimony was all taken in open court. As this court has previously said in two cases: 'On the foregoing facts, the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct, and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact . . .' Easton v. Brant, 19 Fed. (2d) 857, 859; Gila Wat. Co. v. Int. Fin. Corp., 13 Fed. (2d) 1, 2."

Conclusion.

From the foregoing presentation of authorities, it is evident that the turnover order of February 4, 1935, concurred in to the extent stated in the opinion of the District Judge, did become a final order, and no appeal has been taken therefrom; that the certificate of the Referee under date of September 23, 1935, could not in any wise affect an order which had become final a long time prior thereto; this apparent disregard of every prerequisite of judicial notice, however, permitted the bankrupt to present his petition for discharge to the District Court. The objections were properly made by the objecting creditors; a just hearing was had thereon, as indicated by the records of the case, and the opinion of the Special Master has been fully concurred in by the District Judge. Aside from the presumptions therefrom arising, it would be a grave and most flagrant disregard of any precept of lawful determination of cases and the requirements of the Bankruptcy Act if, in view of the adjudication and the acts indulged in by the bankrupt as disclosed, the order of February 4, 1935, could be disregarded.

It is respectfully urged that the appeal herein be denied and that the order of the District Court be affirmed.

Respectfully submitted,

BENJ. W. SHIPMAN,
Attorney for Appellees.

No. 8411.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

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In the Matter of
JOSEPH H. GRANDE,
Bankrupt.

Joseph H. Grande,
Appellant,
vs.
Arizona Wax Paper Company and State Produce Exchange,
Appellees.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED.

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APPELLANT'S REPLY BRIEF.

On page 15 of appellees' brief, they have divided the questions involved into six subdivisions, the first of which is the order of February 4, 1935, asserted to be a final order. We again call the attention of the Court to the force of the order of February 4, 1935, which cites the following:

I.

A. That prior to March 2, 1934, the bankrupt was extensively indebted.

B. That his debtors were pressing him.

C. That one or more had obtained judgments against him.

D. That to delay and defraud his creditors he "assigned, transferred and set over without consideration automobiles, cash, merchandise, leases and contracts to Grande-California Inc."

E. This corporation was created "for the purpose of permitting the said Joseph H. Grande to do business without being hindered by his creditors so that he could retain possession of his property under the corporate name of Grande-California Inc."

F. The Court finds that no person invested any money either as a contribution to capital assets or otherwise, to Grande-California Inc. either at the time it was incorporated or at any time since, and that Joseph H. Grande is the owner in fact of said corporation, its corporate stock and all of its assets.

This last finding, if it means anything at all, means *"no person,"* Grande as well as no other person, invested any money at any time or contributed anything to the capital assets of any nature or description. No stock was issued and all of its assets belonged to Joseph H. Grande. This means, if it means anything, that Grande-California Inc. was incorporated but nothing was conveyed to it either in cash, money or anything else. No stock was issued and the corporation was simply incorporated with no vital existing force.

The preceding finding, D, charges that he "transferred automobiles, cash, merchandise, leases and contracts to

Grande-California Inc." This latter finding, F, destroys the preceding finding, D, for if he "transferred automobiles, cash, merchandise, leases and contracts to Grande-California Inc." then surely the corporation would have some assets or something of some character.

G. So far the findings mean nothing. There is a further finding that the attorney for Grande did not contribute any money to Grande-California Inc. but that the check paid to him was for legal services for the incorporating of Grande-California. This confirms finding F.

H. The next finding is that the daughter, Hazel D. Grande, and Gladys Fritz have at no time contributed any money to the capital assets of said corporation, or any money in payment of the stock, but there is no finding that any stock was ever issued to Hazel D. Grande, James Donovan or Gladys Fritz for any purpose.

I. The next finding that the assets of Grande-California Inc. have not been turned over to the trustee and that "he has not come into the possession thereof at this time."

The conclusion from these findings, if any conclusion can be drawn at all, is:

1. That Grande-California Inc. was created.

2. That Grande owned it and no one else had any interest in it whatever.

3. That Grande-California Inc. had no assets or any property at all.

4. Then the last finding that "Grande-California Inc. failed to turn over to the trustee its assets," was finding an impossibility when it also found that it had no assets.

Conclusions.

I. That the corporation, Grande-California Inc. is the *alter ego* of Joseph H. Grande, the bankrupt.

II. That the bankrupt, Joseph H. Grande, is the sole owner of all of the capital stock of said corporation and all of its assets.

III. The next conclusion is that Grande is the owner of everything.

These are all the conclusions found by the referee. There is no finding by the referee, or no conclusion from the finding, that Grande or any other person was holding, concealing or secreting any property of the bankrupt or that Grande failed to enumerate in his schedule of assets all of the things mentioned in the findings, "automobiles, cash, merchandise, leases and contracts," which were claimed to be turned over to Grande-California Inc.

There is a difference in the findings and conclusions in this: that the findings enumerate "automobiles, cash, merchandise, leases and contracts as assigned to Grande-California Inc." while the conclusions are that Grande is the sole owner of the corporation, its assets, "trucks, cash, merchandise, leases, contracts, personal property of every kind and description," but it does not specify any particular trucks, any amount of cash, any merchandise, any leases or any contracts that Grande did not turn over or enumerate in his schedule of assets.

From the findings and conclusions, here follows the order based thereon: it orders "the trustee to take immediate possession of all the assets of the bankrupt standing in the name of Grande-California Inc." There is no finding that specific property of Grande is held in the

name of Grande-California Inc. The next paragraph under the order is an additional finding which had been heretofore found that Grande was in control of the corporation. The last order is an injunction against Hazel D. Grande, Daisy Grande and others "from interfering with the possession, use and occupation of the assets of Grande-California Inc. by the trustee in bankruptcy."

From the foregoing it will be seen that this is not a judgment in any sense of the term, "judgment." It was an order against Grande individually. It was an order against Grande-California Inc. It was an order to the trustee to take possession of automobiles, cash, merchandise, leases and contracts either in the possession of Grande-California Inc. or in the possession of Grande. It was in the nature of a mandatory injunction as against Grande and an injunction against other persons named against interfering with the trustee. While it is true that the bankrupt endeavored to bring this matter before the District Court he was unable to do so for the reason that the Court held it had no jurisdiction, that the attempt to bring it before the District Court was too late. There was but one purpose which this order of February 4, 1935, could serve—to take from Grande what the turn-over stated that he had not turned over in his original schedule, but the order is fatally defective in that the petition to secure the turn-over order is recognized as extraordinary procedure and must be issued with great care and must have some foundation upon which to base it. The petition upon which the order is based originally was sworn to by the trustee *on information and belief*. The referee denied the order upon that ground and permitted the trustee and his attorney to prepare a verification, not upon information and belief, but that it must be sworn to upon

the "absolute allegation of fact." The order itself shows that when the Court denied the order by reason of its want of verification, as required by law, that it did not take the attorney for the trustee but a few moments to write a verification of "absolute allegation of fact." If the trustee obeyed this mandatory order it was his duty and his attorney's duty "forthwith to take immediate possession of all the assets of the bankrupt standing in the name of Grande-California Inc." and if he did not do so and was prevented from doing so it was either his duty to make a return under the turn-over order to the Court that there were no such assets as "automobiles, cash, merchandise, leases and contracts" that were in the possession of Grande, or if there were such in the possession of Grande that Grande should have been cited for contempt of court and upon his refusal to turn over what was charged as being in his possession, he should have been committed to jail for contempt for disobeying the order, but so far as the record shows neither did the trustee make any return to the Court that there were no such property belonging to the bankrupt delivered to him, nor to specifically set forth what he knew to be in the possession of Grande or under his control and have Grande arrested.

This order of February 4, 1935, is the only claim upon which the protest against the discharge of the bankrupt, Grande, is based. The allegations of objections to the discharge are known and recognized by all of the Courts in bankruptcy as pleadings and they must be subject to the same rules of pleadings both in civil and criminal procedure. It is unnecessary to cite cases in support of this proposition for it is well settled and recognized. In each of the protests against the discharge of the bankrupt, this order of February 4, 1935, is made the basic ground upon

the objection. When the order in reference was made to the Special Master, Dickson, this turn-over order was introduced in evidence over the objections of bankrupt and the Special Master in his findings recites the fact that it was upon this turn-over order and other evidence offered before Referee Turnbull, upon which he based his findings and report to the District Court. This procedure upon the face of it, and as reported by the Special Master, shows that he had no authority and was in violation of the law to review any findings of the original referee but that he must hear independent evidence based upon the allegations set forth in the protest against the discharge. This, in itself, destroys the force and effect of the findings of the Special Master.

II.

To sustain the order of February 4, 1935, as a final order, certain cases have been cited.

On page 16, appellees' brief, *Page v. Arkansas Natural Gas Corp.,* 286 U. S. (76 L. Ed. 1096), the only thing decided by that case is this, that a referee in bankruptcy has jurisdiction if the parties consent to have him hear and determine an adverse claim of title to property in possession of the trustee in bankruptcy, and that was all that was involved in that case.

The next case cited, which is quoted at length on page 17 of appellees' brief and cited on page 18, is *Oriel v. Russell,* 278 U. S. 358, 73 L. Ed. 419. This gives the appellees very little comfort.

> "With reference to the character or degree of proof in establishing a civil fraud, the authorities are quite clear that it need not be beyond reasonable doubt,

because it is a civil proceeding. Lalone v. United States, 164 U. S. 255; United States v. American Bell Telegraph Co., 167 U. S. 224, 42 L. Ed. 144.

"The Court ought not to issue an order lightly or merely on a preponderance of the evidence, but only after full deliberation and satisfactory evidence, with the understanding that it is rendering a judgment which is only to be set aside on appeal or some other form of review, or upon a properly supported petition for rehearing in the same court.

"A turn over order must be regarded as a real and serious step in the bankrupt proceedings and should be promptly followed up by commitment unless the bankrupt can show a change of situation after the turn over order relieving him from compliance. There is a possibility, of course, of error and hardship, by the conscience of judges in weighing the evidence of a clear perception of the consequences, together with the opportunity of appeal and review, if properly taken, will restrain the courts from recklessness of bankrupt's rights on the one hand and prevent the bankrupt from flouting the law on the other."

Objection number 2, page 19, appellees' brief, "Objections of the Appellee Creditors have been filed in pursuance to General Order No. XXXII." This means that there has been an attempt, on the part of the appellees in their objections to the discharge of the bankrupt to proceed under General Order XXXII, and cites the case of *Lerner v. First Wisconsin Nat. Bank,* 294 U. S. 116, 79 L. Ed. 796, which does not sustain in any way the sufficiency of the objections to the discharge of the bankrupt as will be seen by the following:

> "The conclusive effect in a proceeding of this sort of an order of 'turnover' finds its analogy in the inquiry in contempt proceedings for violating an injunction issued by a court of general jurisdiction."

That portion cited under subdivision 3 of appellees' brief, page 21, to sustain the order of February 4, 1935, quotes section 14 (b), subdivision 4, of the Bankruptcy Act, does not sustain the objections to the discharge of the bankrupt nor is there any finding in the order of February 4, 1935, that establishes any fact that would bring it within subdivision 4 of section 14 (b) of the Bankruptcy Act. The only way by which such an application could be made of that section would be as follows: if Grande under the order of February 4, 1935, was found to have property that he did not deliver, or if the trustee as directed to take possession of the property of the bankrupt had done so (and then the Court found that it existed as a fact), that Grande did have property that he did not turn over to the trustee but that the trustee found this property, then made a report to the Court, there would be some basis upon which to deny the discharge of the bankrupt.

There is no decree or judgment entered upon the writ or order to the trustee. The trustee would have to first file and make a return of property that Grande concealed before a final order could be made or before the order of February 4, 1935, was determined or considered as a final order.

Under section 14 (b), subdivision (4), in our opening brief we have pointed out to the Court that the Courts will not permit frivolous matters to be a bar to the discharge of a person in bankruptcy:

> "Allegations sufficient to show that all essential facts existing bring the opposition within the grounds specified by the statute, * * * they should be pleaded with greater particularity than complaints in civil actions; indeed, they more nearly resemble indictments."

Under subdivision 5, appellees' brief, page 24, there is cited *Freshman v. Atkins,* 269 U. S. 121, 70 L. Ed. 193. The only point decided in that case is as follows: "the pendency of a voluntary proceeding in bankruptcy precludes the consideration of a second such proceeding in respect of the same debts." The second point decided was that "the court may of its own motion deny a discharge upon a voluntary petition in bankruptcy where a former voluntary petition for discharge is pending with respect to the same debts included in the second petition."

The last subdivision 6, appellees' brief, page 26, "Findings of a Special Master or Referee Approved by the District Court Are Conclusive of the Question of Fact and Will Not be Disturbed Except in Case of Gross Error." That may be true as an abstract proposition but in order to assume and support it as a concrete proposition all the elements and definite procedures up to the final approval of the District Court must be of such character that a Court of Equity must say that no injustice has been done the bankrupt. The appellant in this case has assigned not only the ruling of the Special Master and pointed out the infirmities of his report but called to the attention of the District Court those infirmities and violations of the express duties of the master in this: That the Special Master was clothed with no authority either in law or in fact to review the facts of his predecessor, Turnbull, and had no authority to admit as evidence be-

fore the Special Master any evidence that was before the original referee and to accept the findings of the original referee as his own, to admit in evidence the turn-over order and to accept it as evidence was without any justification whatever, and the District Court was without authority to confirm the report of the Special Master which on its face discloses that he violated his duty in the admission of evidence and in adopting the ruling of his predecessor as part of the facts found by him when the law expressly declared:

> "Neither should the new Master use the record of the Referee upon which to base his findings." (162 Fed. 983.)

Sufficiency of Verification.

As to the sufficiency of verification to a protest against the discharge of a bankrupt wherein the petition has been verified on information and belief, there is some variance in the opinions in the Circuit Courts of the United States. The earlier cases were inclined to hold that a verification need not be positive but the later cases hold where a verification is made that the statements are true to the best of the affiant's knowledge, information and belief, *is insufficient.* We find, *Re Abramovitz,* 253 Fed. 299; *Re Slatkin,* 286 Fed. 242; *Re Grossberg* (1926 D. C.), 11 Fed. (2d) 329, in which it is held that the verification must be other than on information and belief. In *Re Glass,* 119 Fed. 509 (1902 D. C.), the Court says:

> "In the very beginning there was a rule made by this Court that attorneys should not be allowed to verify by oath the pleadings and proceedings in bank-

ruptcy practice. The foregoing authorities show conclusively that such is the general rule in all courts, unless it has been changed by statute, and there is no act of Congress permitting it. Where there is no statute, the practice in equity—and it is the same in bankruptcy—is that, when a party had to sign the pleadings (as, for instance, an answer in chancery), or when a party had to verify the pleading, the signing or verification had to be done personally, and could not be done by attorney, both as to natural persons and as to corporations. In extraordinary circumstances—as, that the party was beyond seas, or was mentally or physically incapacitated, or where the facts were peculiarly within the knowledge of the attorney, or the like—the court could make a special order that the signature and oath might be made by an agent or attorney; but always the previous order must be had, and the form of verification and signature must set out the special facts as a reason for the departure from ordinary practice; and this rule was very strict. The reason for it is plain,—that the adversary party shall have the responsible person bound by his own act, so that he should not be able to repudiate it, and put the other to the proof of an express or implied authority in the attorney, who might have neither, and, in the absence of a statutory authority, would have neither, except where the preliminary order of the court before mentioned had provided against that absence of authority. Etc."

This is a very clearly stated case and is the trend of modern procedure in bankruptcy matters. The Court in closing the opinion says: "There can be no implied authority, therefore, from the act itself, the orders, or the forms, for any signature or verification by an attorney."

Conclusion.

With the foregoing suggestions we submit to the Court the following points involved in this appeal.

I.

What is termed the turn-over order by appellees, or the order of February 4, 1935, cannot in law or in fact be classed a turn-over order. If it has any legal significance, it is an order to show cause. No action was ever taken or anything done by the trustee under this order.

II.

It is not, as termed by appellees, a judgment or a final order.

III.

The denial of the District Court to hear the order to show cause against the trustee, Turnbull, dismissing the same determined nothing except the fact that the Court had no jurisdiction to hear the same for the reason that a petition for review was not filed within ten days after the rendition of the order to show cause, or what is termed the turn-over order.

IV.

The recitals in the order to show cause as facts and the charges made in the order to show cause against the bankrupt were never passed upon either by the referee, Turnbull, or the District Court. Hence there could be no judgment based upon the accusations without hearing

thereon. Whatever classification, or force, is to be given to the order of February 4, 1935, is only a procedural order directing the trustee to take possession of all the assets of the Grande-California Inc. Failure to disclose what the trustee did, or did not do, under that order does not validate or give any force or effect to it.

V.

Before the order of February 4, 1935, could have any force or effect to prevent Joseph H. Grande, bankrupt, from being discharged the substance of the charges in the order would have to be clearly established. The trustee should have obeyed the order, taken possession of what property the Grande-California Inc. had, and reported to the trustee what he actually took possession of as property of the Grande-California Inc. If he found no property of Grande-California Inc. then he should have so reported to the referee. This would have vindicated not only the trustee in this, that he obeyed the order of the referee, and would likewise have vindicated the bankrupt, but this order is held over the bankrupt as an indictment or a warrant of arrest unexecuted and when the bankrupt asked to be discharged the trustee remained silent, the referee who made the order of February 4, 1935, remained silent but the attorney for the trustee, not in behalf of the trustee but in behalf of a personal client, a creditor of the bankrupt, goes into Court and attempts to use this indictment as a ground of objection to the discharge of the bankrupt. Such conduct cannot be justified in law or in fact.

VI.

It will be remembered that Grande-California Inc. was not in bankruptcy nor was any effort made on the part of trustee to involve the Grande-California Inc. in bankruptcy. Moreover there was no finding made by trustee, Turnbull, that would, on its face, justify the trustee in executing one for no specific property was pointed out anywhere of any kind or character that was concealed by the bankrupt, Grande, or left out of, or undisclosed in his schedule of assets.

VII.

Benjamin W. Shipman had no right to verify the protest against the discharge of Grande, the bankrupt, and had no authority to verify the protest on information and belief. The protest against the discharge of Grande being recognized as a pleading in bankruptcy procedure shows upon its face that it is insufficient upon which to base any protest whatever.

VIII.

The District Court erred in referring the matter of the protest to the Special Master, Dickson, in that specifications in the protest were wholly insufficient and if heard in the state courts over motion or demurrer would have been stricken from the record.

IX.

As appellant has heretofore pointed out, the special master and counsel for protestant so conducted the protest

that the findings of the special master upon the face of them disclose that he based his findings and conclusions upon evidence that was not admissible under any circumstances and reviewed and adopted as the substance of his findings what is set forth in the order of February 4, 1935, termed by appellees as the turn-over order.

Appellant respectfully submits that upon the record and the citations that appellant has made, and the facts clearly disclosed to the Court the ruling of the District Court approving the report of the Special Master and denying the discharge of the bankrupt, Grande, is erroneous, unjustified, and should be reversed.

Respectfully submitted,

JAMES DONOVAN,
Attorney for Appellant.

No. 8411.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

—— 18

In the Matter of
JOSEPH H. GRANDE,
Bankrupt.

JOSEPH H. GRANDE,
Appellant,

vs.

ARIZONA WAX PAPER COMPANY and STATE PRODUCE EXCHANGE,
Appellees.

PETITION FOR REHEARING.

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Parker & Baird Company, Law Printers, Los Angeles.

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PETITION FOR REHEARING.

To the Honorable Curtis D. Wilbur, Francis A. Garrecht, and Clifton Mathews, Judges of the United States Circuit Court of Appeals for Ninth Circuit:

Comes now, Joseph H. Grande, and presents his petition for rehearing of above cause and in support thereof respectfully shows: That this Honorable Court erred in its opinion in the above entitled case in the following particulars:

I.

In holding that Referee Turnbull made a valid or legal turn-over order.

II.

In holding that the so-called turn-over order of February 4, 1935, is a final order.

III.

In holding "that corporate assets of 'Grande California Inc.' had not been turned over to trustee."

IV.

In holding that "certificate of compliance" was erroneously issued by Referee Turnbull.

V.

In holding that the turn-over order of February 4, 1935, invalidated "certificate of compliance."

VI.

In holding "nor could the improvident issuance of a certificate of compliance affect the validity of creditors' objections", etc. (Opinion, p. 10).

VII.

In refusing to review the attack made by the appellants upon the specifications of Arizona Wax Paper Company, as follows (Opinion, p. 12):

> "We have already set forth the substance of the two sets of specifications and without stopping to discuss the various criticisms offered by appellant we need only to say that the specifications set forth acts in bankruptcy."

VIII.

In holding that (Opinion, p. 12) Shipman as attorney of record for Arizona Wax Paper Company could verify the specifications in behalf of Arizona Wax Paper Company.

IX.

In holding, after quoting part of section 32, Bankruptcy Act, 14, the Court failed to fully consider the attack made by the appellant upon the sufficiency of the objections to the discharge of the bankrupt, as follows:

> "A comparison of the foregoing provisions with the allegations of the specifications filed by the creditors in the instant case will at once disclose that those allegations bring them within the purview of sub-section 4, *supra,* as was reported by the Special Master."

X.

In holding that attorney Shipman, attorney for the trustee, could in the absence of authority of the trustee, file objections to the discharge; that he could appear for two of the creditors as the attorney objecting to the discharge of the bankrupt.

XI.

In holding that the verification of the specifications of Arizona Wax Paper Company was insufficient, and then holding that because the verification of the specifications presented by the Sun State Produce Exchange was good, that

> "therefore, it is unnecessary to consider the attack made upon the verification of the Arizona Wax Paper Company".

XII.

In refusing to pass on objections made to report of Special Master.

XIII.

In refusing to discharge Joseph H. Grande, bankrupt.

We take up the assignments of error *seriatim.*

I.

The Court erred in holding that Referee Turnbull made a valid or legal turn-over order in this:

The order of February 4, 1935, which is found upon pages 3, 4, 5, 6 and 7 of the transcript in nowise responds to essential requisites of a turn-over order as defined by the Courts of the United States. It fails in this, it charges the bankrupt

> "for the purpose of hindering, delaying and defrauding his creditors, assigned, transferred and set over, without consideration, automobiles, cash, merchandise, leases and contracts, to a corporation he then caused to be incorporated, to-wit, the corporation known as Grande California, Inc."

There is no finding here that any automobile, any cash, any merchandise, any leases and/or contracts were assigned or transferred without consideration, or otherwise, to Grande California Inc. To have a finding of the transfer of any property by Grande to Grande California Inc. it must show the number of automobiles, if any, the make of the automobiles, the date when the transfer was made. The Court must take judicial notice of this fact that all automobiles, of whatever make, are registered. If there were any automobiles registered in the name of Joseph H. Grande it was of record and there could not be a transfer except by the registration of the transfer and the delivery to Grande California, Inc. What is true of the automobiles is likewise true of the cash, the merchandise, leases and contracts. It is not enough to say when a person is charged with fraud, or attempt to defraud his creditors by disposing of his property, to sim-

ply say that he disposed of his property using the words, automobiles, cash, merchandise, leases and contracts. That does not identify any particular property whatever and for that reason no property unidentified could be subject to fraud.

The second finding is that these general statements of property were conveyed to Grande California, Inc.

The next finding is that "no person invested any money, either as a contribution to capital assets, or otherwise, to Grande California, Inc." and that "Joseph H. Grande is the owner in fact of said corporation, its corporate stock, and all of its assets." Now that being true, there never was any transfer and could not have been any transfer in law if Grande owned all of the assets, and no concealment.

The next finding is that neither the attorney for Joseph H. Grande, Hazel D. Grande or the secretary of said corporation, invested any money whatever in said corporation.

The next finding is that *"the assets of Grande California, Inc., have not been turned over to the trustee and he has not come into the possession thereof at this time."*

Conclusion: That Grande California, Inc., is the *alter ego* of Joseph H. Grande. If there was any property in the possession of Grande California, Inc. and Grande California, Inc. is the *alter ego* of Joseph H. Grande, the bankrupt, then whatever property that was owned by Joseph H. Grande at any time never passed out of his possession or title and was always in his possession as the *alter ego* of Grande California, Inc. So that if Grande ever did have the property that is ennumerated under the general names of automobiles, cash, merchandise, leases and

contracts and if he created Grande California, Inc. and he was Grande California, Inc. then there never could be in law or in fact any transfer of any property from Grande, the bankrupt, to an identity that was himself. There was no more transfer from Grande according to this finding than there would be from Grande transferring the cash from his left-hand pocket to his right-hand pocket which would not be any transfer at all. Moreover the emphasis that we put upon the defects in this alleged turn-over order is that it does not describe any property. He is charged with having assigned and transferred, for the purpose of defrauding his creditors, automobiles, cash, merchandise, leases and contracts from one pocket to the other still in his possession and under his control. If that state of facts exists, then there was no transfer and could not have been any. To charge a person with having committed a fraud by transferring property from his ownership to the ownership of another, does not establish anything unless the property itself is identified that is the subject of the transfer. So when the finding fails to name any automobiles, any cash, any merchandise, any leases and/or any contracts which were subject of the fraudulent act upon the part of the bankrupt were not named and unidentified, then such a finding is worthless.

There is a rule of law well settled that in the turnover order in bankruptcy it must point out specifically what property has been concealed and diverted from the bankruptcy proceedings. This rule is fundamental and unless the property is specifically pointed out that is sought to be concealed from the trustee or referee in bankruptcy the order is fatally defective. It is nothing more

or less than a conclusion without any facts upon which to base it.

After the findings and conclusions, Referee Turnbull, on the 4th day of February, 1935, made the following order: "Therefore, it is hereby ordered that William I. Heffron, trustee in bankruptcy, forthwith take immediate possession *of all the assets of the bankrupt, standing in the name of Grande California, Inc.,* whether the same exist at Salinas, California, or elsewhere, and use all necessary force so to do." That order was issued February 4, 1935, and it was the only order issued upon the facts and conclusions found in the turn-over order. Has the Trustee, Heffron, obeyed that order? If he has, then it is no longer of any force or effect. It is not a final adjudication as the Court has held in this opinion to which we will refer later. It was the duty and the only operating force from this order of February 4, 1935, to have the trustee in bankruptcy, act who was directed to go to Salinas, California, or elsewhere and use all necessary force to take immediate possession of all of the assets of the bankrupt standing in the name of Grande California, Inc. If there were no assets standing in the name of Grande California, Inc. then the trustee could secure nothing. In any event, when the order was issued, February 4, 1935, it was the duty of the trustee to act under the order. If he found no property standing in the name of Grande California, Inc. he could not take possession of something that did not exist. If he found property standing in the name of Grande California, Inc. then he was bound to take it. If he could not take physical possession of it then he was to take constructive possession of it. If he was in anywise interfered with in the tak-

ing of the possession of it by Grande, the bankrupt, it was the duty so to report to the Referee. At this time, so far as the record shows, it is still an unexecuted order of the Referee with no disclosure by trustee Heffron of what he has done under the order. It was simply held up before the United States District Court as a danger signal and it has passed onto this Court the same way. What force or significance should be attached to this document of February 4, 1935? It is attached later to the objections to the discharge of the bankrupt without disclosing in anywise to the Court whether the same is a live or a dead order.

In re Max Reinboth et al, 16 L. R. A. (N. S.) 341:

> "A trustee in bankruptcy may be charged with the value of assets which never came into his possession, if he failed in his duty to get them into possession."
>
> "In support of exceptions to the report of a trustee in bankruptcy, evidence is admissible as to property belonging to the bankrupt which the trustee fails to reduce to his possession."

II.

The Court erred in holding the so-called turn-over order of February 4, 1935, a final order. This conclusion is based upon the fact that the District Court denied the application for an order to show cause against the Referee, Turnbull. This so-called turn-over order is neither a final order or a final judgment within the meaning of either one of these terms as announced by the Court. The most that can be said of it is that it has one purpose alone to serve, and that is, if there is any assets of the bankrupt, Grande, standing in the name of

Grande California, Inc., that the trustee must go and get it. To that extent it is a final order but not to be in anywise considered a final judgment. It is simply a judicial order directed not to the bankrupt but directed to the trustee to find out if there is any property of record anywhere in the name of Grande California, Inc., if so it belongs to Grande, the bankrupt, and the trustee should take it. That and that only is the significance of the order.

III.

The Court erred in holding "that corporate assets of "Grande California, Inc." has not been turned over to trustee. This is a finding that is not sustained by any part of the record before this Court. In the findings in the order of February 4, 1935, "that no person invested any money, either as a contribution to capital assets, or otherwise, to Grande California, Inc., either at the time it was incorporated, or at any time since, and that Joseph H. Grande is the owner in fact of said corporation, its corporate stock, and all of its assets," if this finding is true, then finding that the corporate assets of Grande California, Inc. had not been turned over to the trustee would be an absurdity because no specific property of anykind or character was named as having been transferred and conveyed to Grande California, Inc., that could be by any known process of human reasoning identified as an existing entity. The only apparent thing that Grande California, Inc. possessed was an imaginary holding on the part of the Referee in the order of February 4, 1935. For these reasons no validity whatever can be attached to the order of February 4, 1935, as the same was, as far as the record shows, abandoned both by the trustee

and the Referee and this order is kept before the Court only to mislead and mis-direct the Court away from the real issues involved in this proceedure.

IV.

The Court erred in holding that "certificate of compliance" was erroneously issued by Referee Turnbull." The Bankruptcy Act has provided particular forms of all bankruptcy proceedings. The record in this case discloses, on September 23, 1935, Referee Turnbull signed a certificate of compliance (P. 8, Tr.) and the same was filed on September 26, 1935 with the Clerk of the Court. Within twelve months subsequent, Joseph H. Grande, being adjudged bankrupt filed petition for discharge and order thereon on October 9. 1935.

On October 9, 1935, the order of notice on petition to discharge was filed. Affidavit of publication was filed October 23, 1935 by the Clerk of said Court. General Orders and Forms, under Act of Congress 1898, Section 9614, page 11382, Volume 9, United States Compiled Statutes, 1916, set forth in detail all forms required under the bankruptcy proceeding. The referee's certificate of compliance is form 56, bankrupt's petition for discharge is form 57, specifications of ground of opposition to bankrupt's discharge is form 58. The procedure thus far for the discharge of the bankrupt is regular and unquestioned. Within the time ordered by the Court, to-wit, December 2, 1935, any creditor was given an opportunity to file objections to the discharge of the bankrupt. There are under Section 32, Bankrupt Act Section 14, certain subdivisions or certain definite grounds upon which oppositions may be made to the dis-

charge of the bankrupt. Whatever grounds are named limit the protestant or objector to those particular grounds. No other ground can be considered by the Court than those that are specifically set forth.

> "A specification which merely follows the general language of the statute, without attempting to set forth particular facts, transactions, or details, is not sufficient. In *re Main,* 205 Fed. 421. In *re Mintzer,* 197 Fed. 647. In *re Lewis,* 163 Fed. 137."
>
> "The specifications should be of such a character that their sufficiency may be tested by demurrer or by exceptions analogous to those allowed in equity. *Troeder v. Lorsch,* 150 Fed. 710."
>
> "The specifications must set forth the facts with the same particularity and exactness that are required in an indictment or a criminal information. In *re Levey,* 133 Fed. 572."
>
> "Discharge is a statutory matter, and the court, as well as an objecting creditor, is confined to the specifications of objection. In *re Newmark,* 249 F. 341."
>
> "Specifications of objection to discharge must exhibit, and evidence in support of them must establish, one of the objections to discharge specified in Bankruptcy Act. In *re Brincat* (D. C.), 233 F. 811."
>
> "Specifications of objection to the bankrupt's discharge which are made on information and belief, and enter into no details as to property, etc., are insufficient. In *re Abramovitz* (D. C.), 253 F. 299."

In the specific grounds of opposition to the bankrupt's discharge filed by Arizona Wax Paper Company we specifically direct the attention of the Court to these grounds: (P. 22, Tr.)

1.

"That, within eleven (11) months immediately preceding the filing of the petition herein by the said bankrupt, said bankrupt transferred and concealed his property, with the intent to hinder, delay and defraud his creditors. That such transfer and concealment was accomplished by the bankrupt by the transfer of his assets to a corporation under the name of Grande California, Inc., and was so transferred within said period for the purpose of defrauding his then existing creditors. That at said time, this objecting creditor was a creditor of said Joseph H. Grande. That said Joseph H. Grande has turned over to said corporation more than one dollar ($1.00) in cash, and various other assets."

It will be seen that the first objection is that said bankrupt transferred and *concealed* his property with intent to hinder, delay and defraud his creditors. What follows in this first ground is an attempt to describe the manner and substance of the transfer. The only specific charge is that he conveyed one dollar to the corporation and various other assets. We submit that this allegation is fatally defective and establishes no charge within the meaning of any of the subdivisions unless the Court possibly could consider it under Subdivision 4 of the Act under which charges could be made. Subdivision 4 reads, "at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition transferred, removed, destroyed or concealed or permitted to be removed, destroyed or concealed any of his property with intent to hinder, delay or defraud his creditors." That portion of Subdivision 4 quoted by objector is "said bankrupt transferred and concealed his property, with the intent to hinder, delay and defraud his creditors."

"A specification of objections to a bankrupt's discharge, that at the time of filing his petition he was the owner of a stock of drugs and general merchandise, no part of which was ever delivered to the trustee in bankruptcy, and that the bankrupt now has possession thereof, was insufficient, in the absence of an allegation that he concealed the same, or in any manner prevented the trustee from taking possession thereof. In *re Taplin,* 135 Fed. 861."

2.

The next charge is that the bankrupt transferred property and assets to his wife principally of money for the purpose of defrauding his then existing creditors.

In *re Agenew,* 225 Fed. 650, the Court said (P. 654):

"(4-6) To constitute the punishable offense of having knowingly and fraudulently concealed while a bankrupt from his trustee property belonging to his estate in bankruptcy, such concealment must have been by the bankrupt, or after his discharge, and the property must have been concealed from the trustee, and such property must have belonged to the estate in bankruptcy. The concealment must be knowingly and fraudulently done. The evidence must be clear. It is evident that the specifications of objection should point out or specify what property was concealed, and when, with some reasonable degree of certainty. In *re Meyers* (D. C.), 5 Am. Bank, Rep. 4, 105 Fed. 353."

There is no charge that it was knowingly and fraudulently concealed.

"A statement that the bankrupt has placed his property in the hands of his wife is insufficient. In *re Hill,* Fed. Case No. 6482."

There was no charge in the specifications that (a) it was transferred knowingly (b) or fraudulently nor does it define the property.

> "An allegation which merely states the creditor's belief that the bankrupt owns property which he is concealing and has not listed in his schedule is insufficient. In *re Thomas* (D. C. 1899), 92 Fed. 912."

The charge of concealment is defective in that it is not alleged that the property was knowingly and fraudulently concealed from the trustee after Grande became a bankrupt.

> "The specifications must distinctly allege a concealment of property or that the trustee has been prevented from taking possession of it. In *re Taplin* (D. C. 1905), 135 Fed. 861."

> "It must be alleged that the property has been concealed from the trustee, a charge that it has been concealed 'from his estate in bankruptcy' is insufficient. In *re Adams,* 171 Fed. 599."

> "An allegation that he has 'not offered to surrender all of his property for the benefit of his creditors' and that he is 'withholding property from his creditors' is not sufficient. In *re Hirsch* (D. C. 1988), 96 Fed. 468."

> "Nor is an allegation that the bankrupt, 'with a fraudulent intent, has failed to include in his schedules property belonging to him.' In *re Adams,* 104 Fed. 72."

> "A specification that the bankrupt has falsely set forth in his petition and schedule that he had no property is defective and insufficient; it must specify what property he had. In *re Beardsley,* Fed. Case No. 1183; in *re Rathbone,* Fed. Case No. 11582."

3.

The next charge is that he transferred and concealed a portion of his property, cash in the bank. That is subject to the same objections as Number 2.

4.

The next charge is that he paid more than a dollar on the purchase of automobiles in the name of his wife. While the testimony that the Special Master had in the four volumes referred to in his report is not before this Court yet this being an equity case, it is within the power of this Court to direct that these four volumes of testimony that was before the Special Master be transmitted to this Court and we respectfully ask that an order issue so directing said four volumes of testimony to establish this particular fact, and appellant's counsel states it as a fact upon his professional honor, that the automobiles referred to in the objections to the discharge of the bankrupt, and the trucks referred to, were automobiles and trucks purchased on time from Paul G. Hoffman Co., with the reservation of the title in the seller and that more than one-half of the purchase price was unpaid and during the examination of the bankrupt before Referee Turnbull the record shows that the automobile seller submitted his contracts to the trustee at the suggestion of bankrupt's counsel and offered to deliver to trustee all of the automobiles and trucks mentioned upon the payment by the trustee to the seller, the balance due on the purchase price.

> "A specification of objections to the discharge of a bankrupt on the ground that he had concealed property is insufficient unless it charge the concealment was knowingly and fraudulently done. Specific-

ation that bankrupt had concealed certain property which had previously been transferred to his sister and in which he had a beneficial interest is not sufficient. In *re Opava* (D. C.), 235 F. 779."

5.

The next charge is that he paid more than a dollar on account of real estate purchased in the name of his daughter, Hazel D. Grande.

Under the rule as announced by the Courts, these are all of the grounds upon which any evidence could be offered, even if the allegations were sufficient.

We submit that the defects in these specifications of grounds are as follows:

1. There is no property named or suggested as having been transferred or concealed in the name of Grande California, Inc.

In *re White,* 222 Fed. 688, the Court said (Page 689):

"By a second paragraph of the second specification it is sought to be shown that the bankrupt transferred certain accounts and notes to his wife for the purpose of concealing the ownership; but this is alleged on information and belief; and so of other notes and accounts, no list or memorandum of which is given. Facts stated upon mere information and belief are insufficient upon which to ground specifications in opposition to a discharge. In *re Thomas* (D. C.), 92 Fed. 912."

"It was not intended, by fixing the statutory grounds for opposing a discharge, to afford the objectors opportunity to go upon a voyage of discovery for ascertaining whether, perchance, they might

find something that would defeat the bankrupt's purpose. But, if the bankrupt be guilty of things that render him not entitled to a discharge, they ought to be directly and unequivocally alleged, so that he will be readily apprised of the direct issue as to them, and enabled to concert his defense, and the proof must be clear and convincing, although not beyond a reasonable doubt."

"The third paragraph of specifications No. 2 is of like character to the second, although relating to real property, and is subject to the same criticism."

(5) "The third specification is subject to the criticism that it does not describe any property which it is alleged the bankrupt has concealed with intent to defraud his creditors. *The property is described as a large amount of groceries and merchandise, and unless the description is made more specific the bankrupt is not apprised of what property the controversy is about.*"

In *re Agnew,* 225 Fed. 650, the Court said (Page 654):

"(4-6) To constitute the punishable offense of having knowingly and fraudulently concealed while a bankrupt from his trustee property belonging to his estate in bankruptcy, such concealment must have been by the bankrupt after the filing of a petition against him, while a bankrupt, or after his discharge, and the property must have been concealed from the trustee, and such property must have belonged to the estate in bankruptcy. The concealment must be knowingly and fraudulently done. The evidence must be clear. It is evident that the specifications of objection should point out or *specify what property was concealed, and when,* with some reasonable degree of certainty. In *re Meyers* (D. C.), 5 Am. Bank. Rep. 4, 105 Fed. 353."

In *re Levey,* 133 Fed. 572, the Court said (Page 576):

> "The bankrupt is entitled to have the specifications of objections made so *explicit and definite* that he may have notice of the *exact charge* made and which he is to meet."

If the allegation was susceptible of proof, or if any evidence was admissible in support of such allegation, some property must be designated specifically. An allegation that more than one dollar was conveyed to the Grande California, Inc. would have no force or effect as an accusation. There is no charge that more than one dollar paid to Grande California, Inc. was done fraudulently or dishonestly or for the purpose of beating or defrauding his creditors. The charge that he had transferred money of the value of more than one dollar to his wife before charging that it was done fraudulently is no charge at all, and the further charge that he transferred a portion of his property, cash in the bank and on hand, to Daisy Grande, his wife, and that he made payments of more than one dollar on the purchase of automobiles for his wife and also payments of more than one dollar for his daughter, being separate and distinct allegations, is nowhere charged that it was done fraudulently and therefore would have no force or effect as a ground upon which to base an opposition to a discharge of the bankrupt. The other reference in the grounds of opposition to the Act of February 4, 1935, does not come within any of the subdivisions or grounds upon which a discharge could be opposed. It will be borne in mind and the attention of the Court is specifically directed to this point, to the fact that the Special Master did not confine his hearing to these allegations, neither did this Court consider the sufficiency of

these allegations but relied more specifically upon the erroneous conclusions reached by the Master.

> "Specifications must present adequate statements of issuable facts, and mere statements of conclusions of law are not sufficient. In *re Holman* (D. C. 1809), 92 Fed. 512."

> "The allegations of the specifications must be clear, distinct, specific, and circumstantial, and they must be so precise and full as to inform the bankrupt of the exact charge which he is called upon to refute, and to inform the court of the exact issue to be tried. In *re Wittenberg* (D. C. 1908), 160 Fed. 991."

V.

On page 22 of the Transcript, are the specifications of grounds of opposition to the bankrupt's discharge by the Arizona Wax Paper Company. On page 27 of the Transcript, are the objections of Sun State Produce Company. These objections are identical, word for word. On page 33 of the Transcript, Special Master announced what he considered to be the issues involved under the application for discharge of the bankrupt based under Section 14-b (4) of the Bankruptcy Act, namely,

> "That the bankrupt had at any time subsequent to the first day of the twelfth month immediately preceding the filing of the petition, transferred, removed, destroyed or concealed or permitted to be transferred, removed, destroyed or concealed any of his property, with intent to hinder, delay or defraud his creditors."

This is the limitation of the charges against the bankrupt. Simplified it means "transferred, removed, destroyed or concealed any of his property with intent to

hinder, delay or defraud his creditors." The Special Master had in mind no property of any kind or character but it was a general blanket allegation. Then he recites "upon the evidence adduced, finds as follows:".

The special attention of the Court is directed to these findings. Beginning on page 33 of the Transcript, and page 34 is a mere recital of what was contained in the objections to the discharge of the bankrupt and is almost verbatim taken from the Exhibit "A" which is attached and made a part of the objections of the Sun State Produce Exchange and the Arizona Wax Paper Company. Then further in the finding on the bottom of page 34 is the following:

> "It was further found in said proceedings, in which said findings and order have become final, that said corporation, to-wit; Grande California, Inc., was caused to come into being" etc.

Practically following the order of February 4, 1935, on page 35,

> "It was further the conclusion of the court from the facts and the evidence that said Grande California Inc., was the alter ego of Joseph H. Grande," etc.

Then further on page 35,

> "That the aforesaid findings and order were introduced in evidence, together with the file appertaining to the above entitled case. That the aforesaid findings and order, dated February 4th, 1935, are a part of the file and proceedings had in the above entitled bankruptcy proceedings."

Then it further recites that application to be relieved of the default by the bankrupt.

On page 36 it recites,

"said bankrupt gave and transferred to his wife the sum of $1350.00, and, on the 10th day of October, 1934, the day upon which his petition was filed, and he was adjudicated a bankrupt, he gave to his wife the sum of $750.00. That said bankrupt, when questioned regarding these transfers to his wife, upon the dates aforesaid, gave no explanation of his act or acts and claimed that he did not remember the occurrence. [Tr. January 25th, 1935, pp. 2-3-4.]"

"A statement that the bankrupt has placed his property in the hands of his wife is insufficient. In *re Hill,* Fed. Case No. 6482."

"Nor a charge that, at the time of filing the petition, he owned and possessed property which he has fraudulently concealed and fraudulently failed to inventory. In *re Taplin,* 135 Fed. 861."

This is a recital of the testimony that was taken before Referee Turnbull and which was contained in bulk when offered in evidence by Attorney Shipman at the hearing before the Master and objected to by attorney for bankrupt.

The further recital, page 36, is almost verbat im what is contained in the order of February 4, 1935.

On page 37 the master recites the following:

"The testimony of the bankrupt throughout the proceedings (referring to the proceedings taken prior before Referee Turnbull) showed an entire lack of good faith and desire on the part of the bankrupt to tell the truth about his financial affairs. For example, on p. 90 of the Transcript, when asked:

"Q. What was your income in 1931?

A. I don't know."

and on page 110 of said Transcript at line 22:

"Q. How much did you make in 1931?

A. Well, I could not exactly say.

Q. Well, approximately.

A. I must have made fifteen or twenty thousand dollars.

Q. In 1931?

A. I think so."

And the record is replete with instances of similar kind.

"A few days before referee's hearing on objections to discharge, objectors noticed bankrupts to produce papers, bank books, etc., for three years before adjudication and afterwards, which bankrupts at hearing stated they refused to do, but referee was not moved to compel production of papers and books. Held, there was no refusal 'to answer any material question approved by the court,' within section 14b(6), because of which discharge should be refused. In *re Rea Bros.* (D. C.), 251 F. 431."

"A discharge in bankruptcy cannot be denied, under section 14b, Cl. 3, as amended by Act June 25, 1910, Par. 6, for a false statement not known by the bankrupt to be false. *Doyle v. First Nat. Bank of Baltimore,* 231 F. 649."

"Under section 14b, as amended in 1903 and 1910, discharge cannot be denied because of general materially false statement in writing to commercial agency on which creditor extended credit, but which was not made for specific purpose of obtaining credit. *J. W. Ould Co. v. Davis,* 246 F. 228."

"In regard to questions of fraud, motive, and intent, it is not sufficient to prove merely suspicious circumstances or conduct which wears a sinister aspect. In *re Howard,* 180 Fed. 399."

"A fraudulent conveyance of property must be shown affirmatively, and it is not sufficient that the bankrupt's evidence on his examination tends indirectly to support the contention of the creditors. In *re Ferris,* 105 Fed. 356."

That refers exclusively to the testimony taken before Referee Turnbull and is clearly evident that no such testimony was taken before the Special Master, Dickson. All of the findings of fact of the Special Master appear upon its face not to have been upon new evidence that was introduced or pertinent to the issues involved before the Master. There was not a single witness called and sworn before the Special Master.

The conclusions of law based upon these findings begin as follows:

"From the foregoing statement of facts and testimony adduced at the trial, the Special Master finds" etc.

When he uses the language adduced at the trial, he refers to the trial had before Referee Turnbull and not before him as Special Master.

None of the findings as set forth anywhere approach the grounds of objections for the discharge of the bankrupt. All that the master finds are matters outside of and beyond the jurisdiction of the matters that were submitted to the Master for his consideration. There is no finding that the bankrupt transferred, removed, destroyed

or concealed any of his property with the intent to hinder, delay or defraud his creditors. The conclusions of law drawn by the Special Master are that notwithstanding the Sun State Produce Exchange was a dissolved corporation yet under Section 399 Civil Code it could collect its debts, dispose of and convey its property, that the Sun State Produce Exchange is a creditor of bankrupt and can "present the objections in the instant proceeding to the bankrupt's discharge." Further conclusion that the order of February 4, 1935, "is a final order," that he assigned "automobiles, cash and merchandise, leases and contracts to a corporation known as Grande California, Inc." Further conclusion, "That such acts took place within the period specified by Paragraph 14-b (4) of the bankruptcy Act." And the further conclusion, "That the bankrupt, within a time the first day of which was subsequent to the first day of twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed and concealed his property with the intent to hinder, delay and defraud his creditors." This is the end of the judgment or report on the objections of the Sun State Produce Exchange.

Aside from the first paragraph of the findings of facts of the Arizona Wax Paper objections, the balance of the findings are identical with the findings of the Master in the objections made by the Sun State Produce Exchange with the exception of the last paragraph of the findings on page 37. The conclusions of law, page 43 of the findings of the Special Master upon the Arizona Wax Paper Company objections, aside from the first paragraph are identical with the conclusions reached in the objections of the Sun State Produce Exchange. The Special Master concludes his report as follows:

"For the foregoing reasons, your Special Master recommends that the discharge of the bankrupt be denied." "All papers are returned herewith as shown on the record of proceedings which accompanies this report, together with the reporter's transcript (four volumes).

Dated at Los Angeles, California, this 6th day of August, 1936.

Hugh L. Dickson,
Special Master."

The report was filed the same day.

It will be seen beyond question by the report made by the Special Master that no evidence of any kind or character, oral or written, was submitted to the Master on any grounds named in either of the specifications of objections to the discharge made by the Arizona Wax Paper Company or the Sun State Produce Exchange. The specific charges cited in the Sun State Produce Exchange objections were that Grande conveyed to Grande California, Inc. one dollar and various other assets; that he gave to his wife a portion of his property, cash in bank and on hand; that he concealed the title in said property in Daisy Grande's name; that he gave her more than one dollar on account of the purchase of an automobile; that he gave his daughter one dollar on account of purchase of real estate, concealed the title to the property in the name of Daisy Grande. Not a solitary word of concealment or any fact to establish concealment either fraudulently or otherwise was offered in evidence at the trial before the Special Master and the record clearly shows that all of the evidence that was offered before the Master was the Four Volumes of testimony taken before Referee Turn-

bull during the prior hearing of the bankruptcy proceedings. No evidence of any kind or character was offered before the Special Master other than what was offered before Referee Turnbull during the progress of the bankruptcy hearing. The Special Master simply took the records and files in the case offered in evidence by Attorney Shipman, over the objection of bankrupt's counsel, accepted the same in evidence and then based his findings of fact and conclusions of law upon the hearing that was had before Referee Turnbull. He reviewed the testimony given before Referee Turnbull and passed upon the order of February 4, 1935, and declared it a final order.

> "New Master can not use the testimony of the former Referee." 162 Fed. 982.
>
> "Notice of application for discharge in bankruptcy is jurisdictional. In re Sykes, 106 Fed. 669."
>
> "As the discharge in bankruptcy is a general privilege and right, the burden rests on a creditor objecting to a discharge to show that the bankrupt is not entitled thereto. Horner v. Hamner, 249 F. 134."
>
> "In view of presumption of honesty, creditors opposing discharge on ground that bankrupt had been guilty of fraudulent transfer of his property have burden of proof. In re Braun, 239 F. 113".
>
> "The testimony of third persons, taken on examination before the referee, is not admissible. In re Goodhile, 130 Fed. 782".
>
> "Creditors objecting to the bankrupt's application for discharge have the burden of proof, and must sustain the allegations of their specifications by satisfactory and convincing evidence, so as to show clearly the existence of one or more of the statutory

grounds for refusing a discharge. Poff v. Adams, Payne & Gleaves, 226 Fed. 187."

"On this hearing only such grounds of objection to the bankrupt's discharge may be heard and considered as have been set forth in the specifications of the opposing creditors, and the evidence will be confined to the material facts alleged in the specifications. In re Taplin, 135 Fed. 861".

VI.

The Court erred in holding that "the certificate of compliance was improvidently issued." This was clear and unquestioned error. We have already called the attention of the Court to the fact that the Supreme Court of the United States has settled as forcefully as though it was an act of Congress the forms to be used in every proceeding in bankruptcy and among those forms is form 56. The law provides that the Referee shall fill out this form, not as is indicated in the appellee's brief as ex-parte procedure, but it is issued upon the authority of law, When the Referee signs a certificate of compliance it carries the same validity that any other order of the Referee carries. It is of like dignity with the turn-over order and might be rightfully said to be paramount to the turn-over order, and it is the foundation upon what the petition for discharge is based and when it comes to the Judge of the Court it comes with the same dignity, solemnity and verify that any other order is presented to the Court. This must be conceded. Until the certificate of compliance is attacked and set aside it is binding upon every person connected with the bankruptcy. The law, however, has provided that all creditors must be given notice and the method of giving notice to them is like-

wise provided so that the creditors if they so desire have open to them an opportunity to question the sufficiency of the certificate of compliance and unless they attack the sufficiency of the certificate of compliance then it must be given the same force and credit, to what is called by the appellee, a final judgment. The Court further says, in its opinion, page 10:

> "But even if the first referee was in error in issuing this certificate of compliance, such error cannot affect the validity of the prior turnover order, which, as we have seen, had become final. 'The referee himself could not set it aside.'"

We call the attention of the Court to the opinion of the United States District Judge, denying the application of the appellant for extension of time to file petition for review of Referee's order of February 4, 1935. This order has been at all times since its confirmation by the Court on February 27, 1935, the ground-work upon which the appellee has maintained its position. We call the attention of the Court to the following language, on page 16 of the transcript of the record:

> "Considering the merits of the case, it is not made to appear that injustice will result to the bankrupt by the enforcement of the order."

This observation of the District Judge indicates that the denial of the extension of time should not work any injury to the bankrupt, and was not regarded by the Court as foreclosing any right to a full and complete hearing in behalf of the bankrupt, or that it would be regarded as a final judgment that would in anywise impair the rights of the bankrupt. It will be observed, however, that the contrary view was taken by the appellee,

and the main and full force of his response to this appeal is based upon the fact that this opinion of the District Court is a final judgment that precludes the Court of Appeals from fully considering all of the facts that would necessarily come before the court on an appeal, and we are under the impression that this thought is entertained by the Appellate Court, in the following language on page 10 of the opinion:

> "Both as to the procedural ground and as to the merits, the appellant has wholly failed to establish that the learned District Judge committed an abuse of sound judicial discretion in denying the appellant's motion for an order to show cause why the latter should not be granted an extension of time," etc.

While the District Court entertained the view that a denial of the application would not do an injustice to the bankrupt, it is further observed by this Court, on page 10 of the opinion, that

> "even if the first referee was in error in issuing this certificate of compliance, such error cannot affect the validity of the prior turnover order, which, as we have seen, had become final."

It is further observed by this Court:

> "It may readily be conceded that this certificate is inconsistent with the recitals in the prior turnover order, with the report of the second referee as special master, of August 6, 1936, and with the court's order denying a discharge".

We call the attention of the Court to this fact, that the turnover order was made on February 4, 1935, and the Referee's certificate of compliance was dated September

23, 1935; that the appellant was entitled to a discharge in bankruptcy. Then the Court concludes that this is "inconsistent with the recitals in the prior turnover order." That is true, but the question then arises, which order should prevail? Then the Court says:

> "even if the first referee was in error in issuing this certificate of compliance, such error cannot affect the validity of the prior turnover order, which, as we have seen, had become final".

Let us test these two statements of the Court. The turnover order, even if it was conceded by appellant to be within the meaning of the law a turnover order, and then a subsequent order was made by the Court, as was made on the 23rd of September, 1935, saying [Tr. p. 18]:

> "that so far as appears from the records and files of my office and matters coming to my attention said Bankrupt has complied with all the orders of the Court and the requirements of the Bankruptcy Act and has committed none of the offenses and done none of the things prohibited by said act".

It cannot be presumed, under the certificate of compliance of September 23, 1935, that the prior turnover order had not been complied with. If the two orders, standing alone, as they do in this record before the Court, and the Court is called upon to pass upon the orders, it must meet these orders in the following manner: First, the Referee made the turnover order on February 4, 1935. On September 23, 1935, it made an order of compliance. How are these two orders to be reconciled? They must be reconciled as follows: First, that the Referee made the turnover order; second, that it made a compliance order. Full faith and credit must be given to the Referee who

made these two orders; full faith and credit must be given to each of the orders. The presumption must follow, then, that the turnover order has been complied with, otherwise the Referee would not and could not make the certificate of compliance.

Now, how can the Court assume the following on page 10 of its decision?

> "But even if the first referee was in error in issuing this certificate of compliance, such error cannot affect the validity of the prior turnover order, which, as we have seen, had become final".

The Court cannot assume, upon the record before it, that the Referee was in error in issuing the certificate of compliance. There is nothing in the record to show, or to rebut the presumption, that the turnover order was complied with. On the contrary, giving full faith and credit to the conduct of the Referee, the presumption of law is that he would not have issued the compliance order unless the turnover order had been complied with. Now, how can the appellee meet and defeat this presumption of regularity in the certificate of compliance? He can only meet it in this way: First, in his objection to the discharge of the bankrupt, he must attack the certificate of compliance, and set forth in his protest against the discharge of the bankrupt that the Referee erred in issuing the order of compliance. Among the things that he must show, first, it is incumbent upon the protestant to show that the turnover order has not been complied with; second, he must show some act on the part of the trustee to get possession of the property embodied in the turnover order and that the bankrupt, or those who were

acting in concert with the bankrupt, prevented the turnover order from being complied with. Until this is done the certificate of compliance must prevail and the protest is of no force or effect.

The order of February 4, 1935, is as follows:

> "Therefore, it is hereby ordered that William I. Heffron, trustee in bankruptcy, forthwith take immediate possession of all of the assets of the bankrupt, standing in the name of Grande California, Inc., whether the same exist at Salinas, California, or elsewhere, and use all necessary force so to do".

Following this is an injunction order, restraining Grande, the bankrupt, and other persons from interfering with the possession, use and occupation of the assets of the Grande California, Inc., by the trustee in bankruptcy. These are the only orders made under the turnover order of February 4, 1935.

This turnover order is found on page 7 of the transcript. On page 22 is the ground of opposition to the bankrupt's discharge filed by the Arizona Wax Paper Company, a co-partnership. On page 27 is the opposition to the bankrupt's discharge filed by the Sun State Produce Exchange, a corporation. In each of these protests the order of February 4, 1935, is made a part by attaching the same as Exhibit "A" to each of the protests, but there is no allegation that the order of February 4, 1935, has not been complied with. It is true that they attach to each of the protests the order of February 4, 1935, and to a certain extent describe the order in the protests, but, so far as any allegation in the protests that the order of February 4, 1935, has not been complied with,

there is absolute silence. More than that, there is no claim made anywhere in the protests that the order of compliance of September 23, 1935, was erroneously issued, or in anywise attacked on any ground whatever.

VII.

The Court was in error in refusing to review the attack made by the appellants upon the specifications of Arizona Wax Paper Company (page 12 of the Opinion) as follows:

> "We have already set forth the substance of the two sets of specifications and without stopping to discuss the various criticisms offered by appellant we need only to say that the specifications set forth acts in bankruptcy."

The Court was in error and it is clearly admitted that they have failed to pass upon the objections made to the specifications by the appellant. The mere recital of the substance of the two specifications does not pass upon the sufficiency of the specifications as a matter of law. The appellant has already pointed out what the opinions of the various Federal Courts have declared what specifications should be in order to have a valid objection to the discharge of the bankrupt. Moreover the law contemplates nowhere that it is sufficient in any opinion that "the specifications set forth acts in bankruptcy". Every decision that passes upon the objections, passed upon the specific objections made to the discharge of the bankrupt which seems to be the essential requisite in order that the bankrupt may have a full and fair hearing before the Court.

VIII.

The Court erred in holding (page 12 of Opinion) that Shipman as attorney of record for Arizona Wax Paper Company could verify the specifications in behalf of Arizona Wax Paper Company.

> "Specifications of objection to the bankrupt's application for discharge must be verified under oath by the objecting creditor. In re Brown, 112 Fed. 49; in re Gift, 130 Fed. 230; In re Servis, 140 Fed. 222.
>
> "Specifications of objection should not ordinarily be signed and verified by attorneys at law or in fact for objecting creditors, instead of by the creditors themselves, but may be so signed under exceptional circumstances. In re Milgraum & Ost, 129 Fed. 827. In this case, the reason why the verification is made by counsel instead of by the creditor in person should be explicitly stated in the affidavit. In re Randall, 159 Fed. 298; in re Baerncopf, 117 Fed. 975."
>
> "Attorneys, solicitors, or other agents should not be allowed to verify the specifications, unless in pursuance of a previous order of court allowing them so to do, and in that event both the order and the oath must state the reasons. In re Glass, 119 Fed. 509".
>
> "Specifications of objections to the bankrupt's discharge, which are made on information and belief, and enter into no details as to property, etc., are insufficient. In re Abramovitz (D. C.) 253 Fed. 299."
>
> "A specification which states the facts only on information and belief is insufficient. In re White (D. C. 1913) 222 Fed. 688".

IX.

The Court erred, after quoting part of section 32, Bankruptcy Act 14, in failing to fully consider the attack made by the appellant upon the sufficiency of the objections to the discharge of the bankrupt as follows:

> "A comparison of the foregoing provisions with the allegations of the specifications filed by the creditors in the instant case will at once disclose that those allegations bring them within the purview of Subsection 4, supra, as was reported by the Special Master." (Page 12 of the Opinion of this Court.)

The Court failed to pass on each ground of objections made by the creditors. Section 32, Bankrupt Act 14, points out specific grounds upon which objections to the discharge of a bankrupt must be made. There is no general or blanket ground that can be made, neither can the Court in passing upon the objections say (if the Court follows the law) "the allegations of the specifications will at once disclose that those allegations bring them within the purview of subsection 4 as was reported by the Special Master". Each specific objection must be taken up and must be tested by the law on every separate and specific ground.

> "As one of the great objects of the Bankruptcy Act was to release honest and insolvent debtors from their debts, the right given to secure a discharge ought to be liberally construed. In re Jacobs, 241 Fed. 620."

> "Under the present Bankruptcy Act, a discharge is a legal right, unless some objection is filed and affirmatively sustained for reasons specifically enu-

merated in section 14 of the Act. In re Kaufman, 239 Fed. 305; In re Whitney (D. C.) 250 Fed. 1005."

"It will be observed that the procedure for the discharge of a bankrupt is technical in character, or what is considered as strictly legal procedure. First, the petition must be filed within a twelve months period. Beyond that time there must be a strong showing in order to retain jurisdiction. Notice of petition for discharge is considered as a pleading within the meaning of the bankruptcy law therefore should be verified under oath. In re Taylor (D. C. 1911) 188 Fed. 479."

"Notice of application for discharge in bankruptcy is jurisdictional. In re Sykes, 106 Fed. 669".

"The trustee can not interpose an objection to the bankrupt's discharge until he shall be authorized to do so at a meeting of the creditors called for that purpose. In re Reiff, 205 Fed. 399."

"If no objection is made to the bankrupt's application for discharge is filed the Court will not of its own motion refuse a discharge although it may appear that the bankrupt has committed some act which would deprive him of the right to a discharge if properly specified and proved. In re McDuff, 101 Fed. 241".

"Specifications must present adequate statements of issuable facts, and mere statements of conclusions of law are not sufficient. In re Holman (D. C. 1809) 92 Fed. 512."

"The allegations of the specifications must be clear, distinct, specific, and circumstantial, and they must be so precise, and full as to inform the bankrupt of the exact charge which he is called upon to

refute, and to inform the court of the exact issue to be tried. In re Wittenberg (D. C. 1908) 160 Fed. 991".

"A specification which merely follows the general language of the statute, without attempting to set forth particular facts, transactions, or details, is not sufficient. In re Main, 205 Fed. 421; In re Mintzer, 197 Fed. 647; In re Lewis, 163 Fed. 137".

"On the trial of a bankrupt's application for discharge, to which creditors have filed specifications of opposition, the testimony must be strictly confined to the issues raised by the specifications, and evidence will not be received which relates to grounds of objection not set forth in the specifications, or which relates to transactions outside the scope of the matters alleged. In re Felts, 205 Fed. 983".

"It is necessary, not only that the opposing creditors should specify some one or more of the statutory grounds for refusing a discharge, but that the particular charge should be sustained by the evidence, that is, each of the constitutent elements of the offense or wrongful act alleged against the bankrupt must be supported by proper evidence and satisfactorily proved. In re Brockman, 168 Fed. 1015".

"The allegations contained in the creditors' petition in involuntary bankruptcy, on which the adjudication was made, are not evidence against the bankrupt on his subsequent application for discharge, even though he suffered the adjudication to go by default. In re Lathrop, Fed. Cas. No. 8105".

From the above cases cited it will be clearly seen that an objection to the discharge of a bankrupt is no mere privilege that can be lightly treated.

X.

The Court erred in holding that Attorney Shipman as attorney for trustee could at the same time appear as such in acting as attorney for objectors to the discharge of the bankrupt when the trustee himself could not appear in behalf of the creditors except upon a majority vote of all the creditors called for that purpose.

> "The trustee can not interpose an objection to the bankrupt's discharge until he shall be authorized to do so at a meeting of the creditors called for that purpose. In re Reiff, 205 Fed. 399".

If the trustee can not appear to make the objection to the discharge of the bankrupt except upon due authority delegated to him by the majority of the creditors, then surely his attorney could not so appear.

> "Under the explicit language of the bankruptcy act, the bankrupt's application for discharge must be heard and determined by the judge of the court of bankruptcy, not by the referee. The latter officer has no jurisdiction either to grant or to refuse a discharge, but this duty is cast upon the judge, who must either hear the case originally or upon the report and recommendations of the referee or a special master, and render the decision. In re Taylor, 188 Fed. 479. All questions on application for discharge are originally for the court and not for the referee. In re Hockman, 205 Fed. 330. While this duty can not be delegated yet, when specifications in opposition to the bankrupt's application are filed, it is in the power of the judge to refer the issues raised thereby to the master, with instructions to ascertain and report the facts. Fellows v. Freudenthal, 102 Fed. 731".

"The district judge held bound to pass an independent judgment on an application for a bankrupt's discharge, regardless of the report of a referee. International Harvester Co. of America v. Carlson, 217 Fed. 736".

"On this hearing only such grounds of objection to the bankrupt's discharge may be heard and considered as have been set forth in the specifications of the opposing creditors, and the evidence will be confined to the material facts alleged in the specifications. In re Taplin, 135 Fed. 861".

XI.

The Court erred in holding, that the verification of the specifications of Arizona Wax Paper Company "was insufficient", and then holding that because the verification of the specifications presented by the Sun State Produce Exchange was good, that "therefore, it is unnecessary to consider the attack made upon the verification of the Arizona Wax Paper Company". Each of the objecting creditors have filed a separate and distinct objection. The Arizona Wax Paper Company has simply filed specifications against the discharge of the bankrupt on its own account alone and while the bankrupt has attacked each objection, each objector and the specifications set forth by each objector, there is an additional objection filed to the objection of the Arizona Wax Paper Company's specifications, to-wit: that the verification of the Arizona Wax Paper Company's specifications is not a verification as the law requires. The law specifically sets forth the verification shall be as follows: (1) By the creditor, (2) that it can not be made on information and belief. There is

no other person authorized, within the construction of the law, permitted to verify the specifications except the trustee when he is duly authorized by a convention of the creditors and he must be expressly authorized before he can verify the specifications. The next condition under which any other person may verify it, is when the attorney verifies it, but there is no provision of the law that modifies the verification so that it can be made on information and belief by anyone whether it is the creditor, the trustee or the attorney, or, in other words, no verification of the specifications against the discharge of the bankrupt can be made upon any other ground than absolute knowledge of the facts sworn to. When the attorney makes the verification he must (1) first obtain an order of court upon application to the court permitting him to verify the specifications. (2) The Court may grant the application, and in addition to granting the application there must be a certificate issued by the court showing that the attorney may verify the specifications, but the verification must disclose the following facts, before the attorney can verify it: (a) that the creditor is unable to verify it and the reasons he is unable to do so must be set forth; (b) the attorney must set forth the fact that he is attorney for the creditor and that the matters set forth in the specifications and objections to the discharge of the bankrupt are matters within his own personal knowledge; and after hearing the application then the Court exercises its discretion as to whether it will issue the order permitting the attorney to make the verification, and if granted a record of the same must be made in the minutes of the Court in the bankruptcy proceedings and it is within the discretion of the court as to whether this shall be granted.

The verification of Benj. W. Shipman is as follows [Tr. p 26]:

> "Benj. W. Shipman, first by me being duly sworn deposes and says: that he is attorney in the within matter for the objecting creditor, Arizona Wax Paper Co.; that he has prepared the specifications of grounds of opposition to the bankrupt's discharge; that the co-partners constituting the Arizona Wax Paper Co. are not within the County of Los Angeles and, for that reason, the affiant executes this verification; that the matters set forth therein appertaining to a turn-over order are true of affiant's own knowledge and, as to the other matters of opposition therein set forth, affiant believes them to be true.
>
> BENJ. W. SHIPMAN".

Subscribed and sworn to before a notary public.

The only thing that Shipman swears to is the following:

> "that the matters set forth therein appertaining to a turn-over order are true of affiant's own knowledge",

all the rest is that he believes it to be true. This is the same as though no verification had been made and without a verification the charges would be worthless. There being no verification, as the law required, the Court is without jurisdiction to hear and determine the objections of the Arizona Wax Paper Company to the discharge of the bankrupt. It would be without any merit or legal excuse to say is it is said in the opinion (page 12 of Opinion):

> "We will concede, only for the sake of the argument, that the verification to the objections filed by the Arizona Wax Paper Company is insufficient."

If the verification is conceded to be insufficient "for the sake of argument", it is insufficient for every other purpose and no vitality or validity is to be given to it by saying that another creditor's verification is sufficient and because someone else's verifications to the objections to the discharge of the bankrupt, Sun State Produce Exchange, is sufficient it could not re-vitalize and make valid the objections of the Arizona Wax Paper Company that has no verification. Let us analyze this further, the Court has cited no law to sustain this analogous position. We can not understand or can we believe that the Court would hold that the verification to the objections filed by the Arizona Wax Paper Company is "insufficient" for the sole purpose of having an argument. If it is insufficient, it is insufficient for all purposes, and if it is insufficient, how can it be concluded

> "It therefore is unnecessary to consider the attack made upon the verification of the Arizona Wax Paper Company"?

The only reason given why it is unnecessary to consider the attack upon the verification of the Arizona Wax Paper Company is that some other verification to specifications for objections is correct. Even the verification of the Sun State Produce Exchange does not comply with the rule in bankruptcy procedure. We have been unable to find any opinions anywhere in the Federal Courts that hold that the form of verification under the Code of California is applicable to the verification in a bankruptcy procedure. But wherever this question of verification in bankruptcy procedure has been passed upon at all, we have found the Courts (the District, the Circuit and Supreme Court) have insisted the verification shall not be made on information and belief and the reasons for it are

so apparent that the courts will not tolerate such procedure or give sanction to it. Any specifications of objections against the discharge of the bankrupt that is not verified absolutely as the law requires is no objection at all and is treated as though no objection was made to the discharge of the bankrupt.

> "As one of the great objects of the Bankruptcy Act was to release honest and insolvent debtors from their debts, the right given to secure a discharge ought to be liberally construed. In re Jacobs, 241 Fed. 620."

XII.

The Court erred in refusing to pass on the objections made to the report of the Special Master. The response to the objections of the Special Master is found in this language,

> "they deal chiefly with the contention that the master's findings were not sustained by the evidence adduced before him".

We insist that this is correct. But the Court declines to pass even upon this question first: that the evidence presented before the Referee and Trustee had not been made a part of the record in this Court; second, the appellate courts will not disturb, except for manifest error, findings of fact concurred in by the Referee and the District Judge.

The Court concludes its opinion (page 13 of Opinion):

> "We have carefully read the record here presented, and find no error, manifest or otherwise, in the findings of the special master or in the decree of the lower court, denying the appellant a discharge in bankruptcy".

The appellant has clearly pointed out to this Court that the specifications to the discharge of the bankrupt, both by the Arizona Wax Paper Company and the Sun State Produce Exchange, show upon their face that they are not sufficient within the meaning of the law upon which refusal of a discharge in bankruptcy can be founded. It is admitted and conceded that no evidence was offered before the master except the four volumes of testimony that was taken before Referee Turnbull, all of which was objected to by the appellant's counsel and should never have been considered either by the master or the District Court or this Court in passing upon the issues in this case. As a matter of law and upon the face of the record itself, the transcript shows that the specifications of objections do not meet in any particular the requirements named in the law and sustained by the opinions of the courts that we have cited.

XIII.

The Court erred in refusing to discharge Joseph H. Grande, bankrupt. We base the claim that Grande should be discharged as a bankrupt on what has heretofore been said and also upon the following citation and two concluding cases. These citations summarize the law of bankruptcy and the rights of the bankrupt to be discharged and the facts involved in the cases cited are as nearly applicable to the facts before this Court as it is possible to find cases. The case of *In re Braus* 248 Fed. 55, is a very extensive discussion and the law clearly defined. We respectfully ask the Court to consider this case as the

questions involved therein are almost identical to the case at bar. We are relying in this appeal upon the obvious errors of law rather than questions of fact. While in our brief on appeal we attack the findings of the special master, not as the Court has stated in its Opinion, p. 13, "upon any findings of fact" but rather upon the apparent error of the master in admitting in evidence the four volumes of testimony that was taken before Referee Turnbull and which was not admissible for any purpose because the master was not clothed with authority to review the evidence that was submitted before Referee Turnbull and for that reason the appellant maintain that it was error of law to admit such evidence. While the Court used this language, page 13 "for the rest, they deal chiefly with the contention that the master's findings was not sustained by the evidence adduced before him." The point we make is that there was no legal evidence, or any legal right on the part of the master to pass upon the evidence that was offered before the Referee, Turnbull. We call the attention of the Court to the further observation of this Court as follows: "We are therefore in no position to review the sufficiency of the findings of the referee, acting as special master." If the Court "are therefore in no position to review the sufficiency of the findings of the Referee acting as Special Master" then how can the Court further say "we find no error manifest or otherwise in the finding of the special master." If the Court was "in no position to review the sufficiency of the findings of the referee" then surely they could not conclude

that they "find no error manifest or otherwise in the findings of the special master."

3 R. C. L. Section 131, p. 309 speaks as follows:

"Section 14b provides that the judge shall hear the application and the opposition thereto 'of the trustee or other parties in interest, and shall 'investigate the merits of the application and discharge the applicant unless he has 'done something that brings him within the condemnation of one of the six grounds for refusal of a discharge, which the section proceeds to specify in numbered clauses. The bankrupt is entitled to a discharge as a matter of right unless debarred upon one of the grounds there enumerated. A bankrupt whose want of frankness as a witness is so reprehensible that if discharges were granted only as rewards to bankrupts who freely furnish information to their creditors, he would be pre-eminently disentitled to consideration, cannot for that reason alone be denied a discharge. Originally in bankruptcy laws, the discharge of the bankrupt may have been incidental and the main purpose the equal distribution of his goods among creditors. But in nearly all of the voluntary cases arising under the Bankruptcy Act of 1898 the administration or distribution of the bankrupt's property has been practically concluded before filing the petition, and the sole object of the petitioner is to be relieved of his debts, and the voluntary cases are several times more numerous than the involuntary. It is therefore now asserted by the courts that the relief of the honest, unfortunate and insolvent debtor from the burden of his debts, and

his restoration to business activity in the interest of his family and the general public, is one of the main objects, if not the most important object, of the law. Accordingly the courts adopt a liberal construction of the provisions of section 14 in the matter of the discharge of honest bankrupts."

In re Augustine L. McCrea, 161 Fed. 246, 20 L. R. A. (N. S.) 246:

"A bankrupt cannot be denied his discharge for wilfully refusing to obey an order to produce his books, if they were lost or destroyed by fire."

In re W. A. Liller Bldg. Co. et al., v. Reynolds et al., 247 Fed. 90, the Court held:

"4. To justify the denying of a discharge to the bankrupt on the ground that he transferred property with intent to hinder, delay or defraud his creditors, the transfer must have been effective to place the property beyond the jurisdiction of the bankruptcy court to seize it by summary proceedings. The Court says: the holding herein that the bankrupt attempted transfer of his property to the corporation was in fact no transfer thereof disposes of the objections made to his discharge. He must have actually 'transferred' such property or removed it, so that it will be beyond reach of his creditors and the bankruptcy court's jurisdiction to summarily seize. This I have held he did not do; therefore he is entitled to his discharge, not having violated clause 4, subsection b, subdivision 14 of the Bankruptcy Act (Comp. St. 1916, 9598)."

In re Braus, 248 Fed. 55: The Court held:

1. "Though provisions for discharge were not an incident to the original bankruptcy acts, those provisions should not be construed against the bankrupt, and, if his discharge is to be denied, it must be because there has been strict proof of the evidence of some one of the bars which the statute has provided."

2. "For a bankrupt to be denied a discharge on the ground of concealment of assets, the case must be made out by more than a mere preponderance of evidence."

3. "Evidence held insufficient to show that the bankrupt who transferred his property to a corporation within four months of bankruptcy was guilty of any fraudulent intent to hinder and delay his creditors; the bankruptcy received practically all of the stock of the corporation."

4. "An insolvent debtor has the right of disposing of his property until the commencement of proceedings in bankruptcy against him."

5. "Though it may have that effect incidently, a transfer by an insolvent debtor can not be set aside under Bankruptcy Act July 1, 1898, 541, sub. 67 e, 30 Stat. 564, (Comp. St. 1916, 9651) as one tending to hinder and delay creditors, unless it was made with the intention of unlawfully hindering, delaying, and defrauding creditors."

6. "An insolvent debtor who owned a number of stores organized a corporation of which he held all of the stock except a few qualifying shares held by his wife and another, and to such corporation he transferred the more profitable stores; it being his avowed intention to break the leases on the un-

profitable stores. The bankrupt made no effort to dispose of the stock so received in fraud of creditors, and contended that he incorporated his more profitable business for the purpose of securing additional capital. Held that, where it did not appear that he had any unlawful intention to hinder and delay his creditors, a discharge could not be denied, though the transfer occurred within four months of the filing of the petition, on the ground that he was guilty of a fraudulent transfer with intent to hinder, delay and defraud creditors."

We earnestly ask the Court to grant a re-hearing in this case and either order the discharge of the bankrupt or return the case to the District Court for further hearing.

Respectfully submitted,

JAMES DONOVAN,

Attorney for Petitioner.

Certificate of Counsel.

I, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and, in judgment of counsel for petitioner, is well founded, and that it is not interposed for delay.

JAMES DONOVAN,

Counsel for Petitioner.

No. 8411

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

——— 19

In the Matter of

JOSEPH H. GRANDE,

Bankrupt.

JOSEPH H. GRANDE,

Appellant,

vs.

ARIZONA WAX PAPER COMPANY and STATE PRODUCE EXCHANGE,

Appellees.

OPPOSITION TO PETITION FOR REHEARING.

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Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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Appellees.

OPPOSITION TO PETITION FOR REHEARING.

To the Honorable Curtis D. Wilbur, Francis A. Garrecht, and Clifton Mathews, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

While it is rather difficult to determine from the petition for rehearing in what particulars the decision of your Honorable Court is contrary to the established weight of authority of the Appellate Courts of the United States of America, the petition for rehearing seems to rest generally upon these premises:

1. That the objections to the discharge are insufficient in form.

2. That no evidence was taken before the Special Master other than the introduction of testimony adduced before the Referee, and that such prior testimony was improperly introduced.

3. That the objecting creditors (appellees herein) cannot object to the bankrupt's discharge in view of the fact that the attorney for the objecting creditors represents the trustee in bankruptcy of the bankrupt's estate.

4. That the element of finality does not appertain to a certain turnover order made by the Referee, finding that acts committeed by the bankrupt within the statutory period were fraudulent acts, though the order of the Referee was affirmed by the District Court:

> First, in refusing to disturb it upon procedural grounds;
>
> Second, in determining that a re-examination of the issues raised would lead to no different conclusion.

As indicated in the opinion of your Honorable Court, the appellant herein avoided the orderly presentation of his cause before the District Court, upon the proceedings wherein objection was made by him to the Special Master's report, by the statement that he was "wholly unable to pay for any extended details, either in the transcript or in the brief, and we curtailed the same for that reason."

The proceedings before your Honorable Court, in the form of the appeal, certainly in no manner complied with the rules prescribed for the presentation of any question by a person feeling aggrieved and seeking appellate relief. However, it is apparent that your Honorable Court was

greatly disposed to consider the question by reason of the fugitive statement made by the appellant as to the lack of means for the presentation of the record or brief.

In the instant petition for rehearing, however, the appellant again seems to impose upon the consideration uniformly being shown him, and in no manner points out wherein the decision of your Honorable Court, of which rehearing is sought by the appellant, in any wise is contrary to the established principles recognized by the courts of the United States in Bankruptcy proceedings.

The decision of your Honorable Court is in conformity with the authority of the United States Supreme Court. We have looked in vain in the petition of the appellant herein to find wherein the opinion of your Honorable Court is not in such full conformity, nor does the extent of this petition for rehearing seem to us to be in agreement with the avowed statement of appellant that he was wholly unable to pay for any extended details either in the transcript or the brief.

Under the consideration of what the appellant designates as his first point, the appellant seems to fall into the error of confusing the obligation of a trustee in his duty to account to the creditors, as to whether or not he has properly taken possession of the assets of the bankrupt and properly dealt with them, and the position of the bankrupt in failing to turn over to the trustee his assets. There is no need for citation of authority to show that these are entirely dissimilar situations. The appellant, in support of his argument, cites from the case of *Max Reinboth, et al.,* 16 L. R. A. (N. S.) 341, on page 8 of his petition. That clearly shows that appellant has in mind the obligation of the trustee to the creditors of the

bankrupt. Wherein that concerns the present situation, or wherein that concerns the bankrupt, or wherein the bankrupt would have a right of issue thereon, is beyond us at this stage of the proceeding.

Considering the points attempted to be made by the appellant in his present petition, the classification which we have set forth above of the medley of digest and foot-note information that, apparently, the appellant seeks to set forth in his petition is, of course, an arbitrary one, but we feel more than fairly presents such classification.

We shall, however, in the interest in clarity make brief comment upon the rough classification into which we have divided the mass of argument:

Insufficiency of Evidence.

The appellant complains of the insufficiency of the specifications. It is to be remembered that no objection was raised to the insufficiency of the specifications before the trial court; particularly, we call to the Court's attention the fact that no complaint was made to any insufficiency of verification or filing by the appellant at any time in the lower court.

If any further answer is needed to the aggregation of scattered argument as to the matter of the objections, it is but sufficient to quote the pertinent matter appearing in the *Main* case cited by appellant:

> "The specification is not verified, though required to be by Section 18c of the Bankruptcy Act . . .
>
> "The specification has not been assailed by the bankrupt, and it may be that the failure to verify the same has thereby been waived."
>
> *In Re Main,* 205 Fed. Rep. 421-422.

Consideration as to Matter of Introduction of Evidence Previously Taken.

The appellant also devotes much time to the introduction of the evidence previously had and taken during the course of the bankruptcy proceeding, and would lead us to believe that such evidence was improperly introduced and that the Special Master considered evidence, adduced in prior proceedings by a Referee previously acting therein, without a proper foundation for the introduction of such evidence. The appellant, however, has not brought up any record which would substantiate that position or in any wise show that the evidence adduced was improperly considered by the Special Master. We believe that a fair statement would be that a Special Master cannot and should not take cognizance of records not introduced before him as a Special Master who is sitting in a special advisory capacity to the Court, but, where any prior testimony is properly introduced, we cannot see why it should not be admissible.

Such objection as the appellant has pointed out relative to the introduction of testimony is not only raised for the first time upon this petition for rehearing upon his appeal, but also refers to instances where a Special Master, without the proper introduction of the prior proceedings had before the Referee, takes cognizance of such testimony. Wherein it is improper to consider prior testimony of the bankrupt, which is being properly introduced in a pending proceeding, has not been pointed out to us, and, being that the testimony referred to by the Special Master is the testimony of the bankrupt himself, it would be, indeed, difficult to think of an ingenious theory that a bankrupt's prior declarations and testimony could not be introduced into evidence against him.

Right of Objecting Creditors to Employ Counsel.

Much time is spent in some sort of a protest that an attorney who represents a trustee cannot represent an objecting creditor to a discharge. No authority is cited in support of this startling proposition. The only thing that would approach the semblance of authority are cases having to do with the unauthorized appearance of a trustee in opposition to a bankrupt's discharge; wherein this may have anything to do with the appearance of a creditor, we have difficulty in understanding; wherein it is proper for a bankrupt to state who his creditor shall employ as counsel, we likewise cannot understand; it must be founded upon the theory that the bankruptcy proceeding is a proceeding wholly under the control of a bankrupt and that his creditors are not concerned with it and have no rights therein. We think the bankruptcy proceeding is a proceeding for the benefit of the bankrupt, in that it absolves him of all further liability where he has lived up to the law under which he would be entitled to such remedial effect.

Recitals in Turnover Order Final.

Counsel for appellant seems to have difficulty in realizing that he has had his day in Court in the proceedings for a turnover order and that these proceedings resulted in a final judgment of a court of competent jurisdiction, which found appellant guilty of acts which are expressly prohibited by the Bankruptcy Act and which bar a discharge of a bankrupt who has committed these acts, and we have, we believe, shown heretofore that the judgment of the Referee upon the turnover proceedings was and is a final judgment (Appellees' Brief, pp. 16-19) and that,

even without any act on the part of any objecting creditor, the presence of that judgment was and is sufficient to bar a discharge upon the theory of judicial notice and the obligation of any Court not to permit a mockery of its own judgments, orders and procedings. (Appellees' Brief, pp. 24-25.)

It is more than late in the day for the appellant to come in upon a petition of this sort and indulge in the type of sophistry with which the petition abounds. For instance, on page 14, a statement is made:

> "The charge of concealment is defective in that it is not alleged that the property was knowingly and fraudulently concealed from the trustee after Grande became a bankrupt."

We know of no such rule of law. Many of the things barring a discharge under Section 14 of the Bankruptcy Act are matters and things committed before the actual bankruptcy takes place, so the very essence of the things recited in the turnover order are that they are matters committed within the statutory period antedating bankruptcy.

In our brief herein filed, we have submitted to the Court the pertinent portions of the decision in *Arkansas v. Arkansas Natural Gas Corp.* (286 U. S. 269, 272); also a portion of the decision by Chief Justice Taft in *Oriel v. Russell* (278 U. S. 358)—(Appellees' Brief, pp. 16, 17 and 18).

Also we have cited authority showing that the prior determination of concealment is conclusive in all subsequent proceedings. (Appellees' Brief, pp. 21, 22 and 23.)

We have likewise shown that it is the particularly uniform rule adhered to by Your Honorable Court that the

findings of a Special Master or Referee approved by the District Court are conclusive of the question of fact and will not be disturbed except in cases of gross error. (Appellees' Brief, pp. 26 and 27.)

To extend this authority and to further develop the argument would serve no useful purpose and none of the arguments attempted by the appellant herein in anywise permits the disturbance of the salutary principles we have set forth, announced both by the United States Supreme Court and Your Honorable Court.

One of the strongest answers to the position of the appellant is the expression of the Honorable William P. James, District Judge, in his opinion of February 27, 1935:

> "I am of the view: (1) That the showing as to the mistake of counsel is not sufficient to justify the making of the order here sought; (2) Assuming that the omission to act was excusable, the facts as presented touching the propriety of the order made by the referee are insufficient to support a substantial claim for error." [Tr. of Rec. p. 17.]

The consideration of Your Honorable Court in determining this appeal has been as laborious and extensive as the presentation of our own cause and such volume of labor was due greatly to the unhappy state of the record submitted by the appellant, and we have been very careful not to permit any tinge of feeling in the submission to the Court of a case where so grave an issue is involved as the denial of a discharge in bankruptcy. More than ever, therefore, we feel disturbed that the appellant has seen fit to predicate his petition for rehearing upon at least several unfortunate misstatements, which we hope

were due solely to confusion. Thus, on page 27, under the paragraph headed "VI", the appellant speaks of form 56 (meaning, of course, the official forms prescribed by the Supreme Court in Bankruptcy) and indicates that form 56 is a form prescribing a certificate of compliance to be issued by a Referee in Bankruptcy. Official form No. 56 deals solely with certification of a question by a Referee to the Judge. There is nothing in the Bankruptcy Act or in the rules of the United States Supreme Court requiring the archaic and meaningless form of the certificate of compliance. That it is properly characterized by us can best be illustrated by the present case. Why the appellant wishes us to believe that a certificate prescribed only by local rule of the District Court is a certificate prescribed by the United States Supreme Court is difficult to understand.

The appellant, in his petition for rehearing, most seriously attacks the proceeding by particularly making the inaccurate statement that no testimony was taken before the Special Master. Thus, on pages 25 and 26 in his petition, the appellant says:

> "Not a solitary word of concealment or any fact to establish concealment either fraudulently or otherwise was offered in evidence at the trial before the Special Master and the record clearly shows that all of the evidence that was offered before the Master was the Four Volumes of testimony taken before Referee Turnbull during the prior hearing of the bankruptcy proceedings. No evidence of any kind or character was offered before the Special Master other than what was offered before Referee Turnbull during the progress of the bankruptcy hearing. The Special Master simply took the records and files in

the case offered in evidence by Attorney Shipman, over the objection of bankrupt's counsel, accepted the same in evidence and then based his findings of fact and conclusions of law upon the hearing that was had before Referee Turnbull."

That such was not the case, it is but sufficient to refer to the Transcript of Record herein and call the Court's attention to the Report of Referee as Special Master, appearing on pages 32 to 44 of the Record. Thus, in the first paragraph on page 33, the Special Master says:

"Evidence, both oral and documentary, was presented and submitted to the Special Master; . . ."

Again, on page 39, having to do with the proceedings affecting the Arizona Wax Paper Company, the Special Master, in his Findings of Fact, states as follows:

"At the time of the trial of the objections presented by said objecting creditor, Arizona Wax Paper Company, the bankrupt denied that said objecting creditor was a creditor of the bankrupt, claiming that said Arizona Wax Paper Company, a co-partnership, was a creditor of persons other than the bankrupt. The Special Master finds, however, that the testimony by the bankrupt is untrue; that the bankrupt, prior to bankruptcy, evidenced the debt by a promissory note, and also acknowledged the indebtedness in writing; declaring it to be his debt in a letter written to one of the members of said co-partnership. . . ."

Also we refer to page 47 of the transcript, where appellant in his exceptions says (par. 3 on said page):

> "Evidence both oral and documentary was presented and submitted to the Special Master; the evidence being closed the cause was submitted to the Special Master for his report, findings and determination."

Conclusion.

We do not know whether our appearance upon this petition has lightened the labors of the Court; in appearing, we are moved solely by that desire. The excerpts from digests and footnotes so copiously interspersed in appellant's petition does not in anywise appertain to the issues. The appellant, throughout the proceedings, disregards the necessary recognition of a final judgment upon the issues heretofore had. We have in our reply brief dealt with the matters having to do with the finality of the turnover order and its effect upon the bankrupt's discharge and also its consequent effect as judicial notice to prevent any action by the Court that would, in effect, nullify the prior judgment. It is needless, therefore, to cover those matters again. No reason appears why the proceedings heretofore had should in anywise be disturbed. The appellant herein has had his day in court and, instead of predicating any appeal for any remedy upon any realization of the impropriety of prior acts, his present petition is based upon a premise of introducing greater confusion and rests upon misstatements.

Respectfully submitted,

BENJAMIN W. SHIPMAN,

Attorney for Appellees.